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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

THE BOSTON TEACHERS UNION, LOCAL 66, ET AL.,

Petitioner,

v.

COMMONWEALTH EMPLOYMENT RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH OF MASSACHUSETTS

PETITION FOR WRIT OF CERTIORARI

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Dated: December 29, 2009

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Labor Relations Commission, an agency of the Commonwealth of Massachusetts, violated the First Amendment rights of the Boston Teachers Union, its officers and executive board members when, after a hearing, it imposed orders, later enforced by the state court, that curtailed their discussion and debate of a possible strike?

II. Whether the state Labor Relations Commission's interpretation and application of M.G.L. c. 150E, § 9A which prohibits public employee labor organizations from "inducing or encouraging" strikes by public employees, violates the free speech and free association rights of petitioner's and other public sector union members in the Commonwealth?

III. Whether the trial court and intermediate appeals courts of the Commonwealth erred in dismissing the counterclaims of the Boston Teachers Union, its officers and executive board members alleging that their civil rights had been violated by the Labor Relations Commission when it imposed coercive orders prohibited union members from meeting to discuss a possible strike and required public disavowal, on pain of contempt, of a resolution scheduling a debate on whether to strike?

LIST OF PARTIES

Defendants/Plaintiffs-in-Counterclaims

The Boston Teachers Union, Local 66, AFT, AFL-CIO,

Richard Stutman in his capacity as President of the BTU,

Patrick Connolly, in his capacity as Executive Vice President of the BTU,

Edward A. Welch, in his capacity as Secretary-Treasurer of the BTU,

Michael McLaughlin, in his capacity as Elementary Field Rep. and BTU Executive Board member,

Caren Carew, in her capacity as Secondary Field Rep. and BTU Executive Board member,

Jenna Fitzgerald, in her capacity as Para/Substitute Field Rep. and BTU Executive Board member,

Patricia Armstrong, in her capacity as Political Organizer and BTU Executive Board member,

Rob Carroll, in his capacity as a BTU Executive Board Member,

Isilda Colonette, in her capacity as a BTU Executive Board member,

Angela Cristiani, in her capacity as a BTU Executive Board Member,

Allison Doherty-Lacasse, in her capacity as a BTU Executive Board member,

Dee Esposito, in her capacity as a BTU Executive Board member,

Mary F. Glynn, in her capacity as a BTU Executive Board member,

Robert F. Jango, in his capacity as a BTU Executive Board member,

Charlie Johnson, in his capacity as a BTU Executive Board member,

Cheryl L. Kelly, in her capacity as a BTU Executive Board member,

Michael Maguire, in his capacity as a BTU Executive Board member,

James "Timo" Philip, in his capacity as a BTU Executive Board member, and

MaryAnn Urban, in her capacity as a BTU Executive Board member

Plaintiffs/Defendants-in-Counterclaims

The Commonwealth Employment Relations Board

Hugh Reilly, in his individual capacity and as a Commissioner of the Massachusetts Labor Relations Commission

John Jesensky, in his individual capacity and as a Commissioner of the Massachusetts Labor Relations Commission

Paul O'Neill, in his individual capacity and as a Commissioner of the Massachusetts Labor Relations Commission

Intervenor

The Boston School Committee

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JURISDICTION

The order from which this petition for review is taken entered in the Supreme Judicial Court on September 30, 2009, and accordingly, is timely filed under Supreme Court Rules, Rule 13.1. The Supreme Judicial Court is the highest court of the Commonwealth within the meaning of 28 U.S.C. § 1257, and is the state court of last resort within the meaning of Supreme Court Rules, Rule 13.1. The Supreme Judicial Court's September 30, 2009 order denied discretionary review of a decision of the intermediate state appeals court. This petition raises a question concerning the validity of a state administrative agency's interpretation, fully enforced by the state's highest court, of a state statute under the First Amendment to the Constitution of the Unites States of America.

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Massachusetts General Laws c. 150E, § 9A

(a) No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall induce, encourage or condone any strike, work stoppage, slowdown or withholding of services by such public employees.

(b) Whenever a strike occurs or is about to occur, the employer shall petition the commission to make an investigation. If, after investigation, the commission determines that any provision of paragraph (a) of this section has been or is about to be violated, it shall immediately set requirements that must be complied with, including, but not limited to, instituting appropriate proceedings in the superior court for the county wherein such violation has occurred or is about to occur for enforcement of such requirements.

STATEMENT OF THE CASE

The Petitioner, Boston Teachers Union ("BTU", or "the Union"), is the sole agent for purposes of collective bargaining on behalf of teachers, paraprofessionals, substitute teachers and school nurses in Boston Public Schools ("BPS"). See

Appendix, pp. 4a-5a. The School Committee of the City of Boston ("the School Committee"), a seven-person board appointed by the Mayor of Boston, is responsible for operation of BPS and negotiates with the Union on behalf of the City of Boston. See Appendix, p. 4a. Pursuant to the former Massachusetts General Laws c. 23, § 9O, the Labor Relations Commission ("LRC", or "the Commission") was a three-member panel of "Commissioners", appointed by the Governor of the Commonwealth, tasked with administering M.G.L c. 150E, the law governing public employee collective bargaining. The Legislature enacted public sector collective bargaining reform in 2007, see St. 2007, c. 145, which abolished the Commission and put in its place the Commonwealth Employment Relations Board ("CERB", or "the Board"). The Board voluntarily substituted itself for the Commission in this litigation, and stands in the former Commission's shoes for all purposes at this stage.[1]

The Union and the School Committee were engaged in negotiations for a successor collective bargaining agreement throughout 2006. See Appendix, p. 5a. On December 20, 2006, the Union's executive board approved the following motion:

> To place before the membership on February 14, 2007 for discussion, consideration and debate by that body, in accordance with the bylaws, the question whether there should be a one day strike on February 15, 2007 or on

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[1] This petition will refer to the agency as "the LRC" or "the Commission:" as that was the official designation at the time the events at issue herein occurred.

> such other date(s) as may be chosen by the membership.

See Appendix, p. 9a.

On January 9, 2007, the School Committee petitioned the Commission to conduct an investigation pursuant to M.G.L. c. 150E, § 9A(b) to determine whether by approving that motion the BTU, its officers and executive board members (collectively, "BTU", or "the Union") violated G.L. c. 150E, §9A(a), which prohibits strikes by public employee unions in the Commonwealth, and further prohibits encouragement or condonation of strikes by public employee unions. See Appendix, p. 2a. On January 11, 2007, the Union asked the Commission to dismiss the petition, relying on long-standing Commission precedent that held a strike is "about to occur" within the meaning of G.L. c. 150E, § 9A only when no further action is required by the union in order for a strike to commence. See Boston School Committee, 20 MLC 1244, 1246 (1993); see Appendix, p. 3a. Because the Union bylaws require a vote of the membership for a strike to occur, and no such vote had been taken, there were still steps to be taken before a strike could commence. See Appendix, p. 6a. The membership debate on that question was scheduled for February 14, nearly two month following the executive board's vote and fully one month from the filing of the strike investigation petition with the Commission. See Appendix, p. 9a. The Union's motion to dismiss was denied. See Appendix, p. 3a.

After hearing, the Commission issued a Final Order, dated January 18, 2007, in which it stated that by scheduling a date for the Union membership

to debate and vote on whether to strike, the Union violated G.L. c. 150E, § 9A(a). See Appendix, p. 24a. The Commission imposed the following conditions, among others:

> 1. The Union, its officers, Executive Board members, and employees it represents shall not engage in or threaten to engage in, a strike or work stoppage of any type.
>
> 2. The Union, its officers, and Executive Board members shall immediately cease and desist from inducing, encouraging, or condoning any strike, work stoppage, or other withholding of services.
>
> 3. The Union, its officers, and Executive Board members shall immediately, but in no event any later than 1:00 p.m. on January 31, 2007, convene a meeting of the nineteen member Executive Board and take any necessary action to rescind the vote of December 20, 2006...
>
> 4. The Union, its officers, and Executive Board members shall publicly disavow the December 20, 2006 vote of the Executive Board that placed the Motion in paragraph 3, above, before the Union's general membership by announcing this disavowal to the media in the same manner and method that the Union uses to announce other issues of importance to its membership.

Such disavowal shall be completed on or before 1:00 p.m. on January 31, 2007.

5. The Union, its officers, and Executive Board members shall take any necessary steps to notify the employees whom it represents of: its public disavowal of the December 20, 2006 vote of the Executive Board that placed the Motion in paragraph 3, above, before the Union's general membership. Such notification shall be completed before 1:00 p.m. on January 31, 2007 and shall be accomplished using the Union's usual methods of communicating with the employees it represents, including but not limited to: a) posting an emergency information bulletin on the Union's web site; and b) broadcasting an electronic mail message to all those employees and other persons to whom the Union regularly and routinely sends electronic mail.

6. The Union, its officers, and Executive Board members shall take any necessary steps to notify the employees whom it represents of their obligation to fully perform the duties of their employment, including the obligation to not participate in any form of strike or work stoppage. Such notification shall be completed before 1:00 p.m. on January 31, 2007 and shall entail the methods of

> communication set forth in Paragraph 5(a)-(b) of this Order. .
>
> 7. The Union, its officers, and Executive Board members shall take any necessary steps to inform the employees whom it represents of the provisions of Sections 9A(a) and (b) of the Law and the contents of this Order. Such notification shall be completed before 1:00 p.m. on January 31, 2007 and shall entail the methods of communication set forth in Paragraph 5(a)-(b) of this Order.
>
> ...

See Appendix, pp. 24a-27a.

In finding the Union in violation of M.G.L. c. 150E, § 9A, the Commission relied, in part, on "incendiary" statements made by Union leadership to the membership describing the School Committee's bargaining proposals, including "That's unacceptable," and "We're not going backwards", transmitted by e-mail from the Union leadership to the membership. See Appendix, p. 19a. Further, the Commission expressly declined to address the constitutional issues raised by the Union during the course of 9A proceedings. See Appendix, p. 15a.[2]

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[2] The Commission's statement that it is compelled to presume the constitutional validity of its organic law is ironic insofar as the law is susceptible of an interpretation which does pass constitutional muster, and indeed, the Commission followed a constitutional reading of M.G.L. c. 150E, § 9A for many years prior to this case. See Appendix, p. 15a. Regardless of whether the Commission is duty-bound to presume the constitutionality of the statute it administers, it is equally duty-bound to apply it in a manner faithful to constitutional principles.

The Commission held a compliance hearing on January 31, 2007 and issued a "Decision on Compliance" dated February 6, 2007, in which it found that the Union was not in compliance with paragraphs 1 through 8 of its January 18, 2007 order. See Appendix, p. 33a, 37a. On February 9, 2007, the Commission sought enforcement of its orders in the state trial court having jurisdiction to hear the matter, see M.G.L. c. 150E, § 9A(b), and sought a temporary restraining order to enjoin the Union from further disobedience. See Appendix, p. 43a. The Court allowed the application for a temporary restraining order, which it later converted to a preliminary injunction. See Appendix, p. 43a. The injunction enforced paragraphs 1-2 and 4-7 of the Commission's January 18 order almost verbatim. See Appendix, pp. 45a-47a.

On February 16, 2007, the Commission requested that the Petitioners be adjudged in contempt of the injunction. See Appendix, p. 48a. The same day, the Union filed counterclaims against the Commission and the individual Commissioners alleging that issuance of the orders violated the First Amendment free speech and association rights of the BTU, its officers and the executive board members. By order dated February 26, 2007, the Court found the Union in contempt of the injunction and assessed a coercive fine of thirty-thousand dollars ($30,000) per day with a daily escalator for each day of continuing non-compliance. See Appendix, pp. 58a-59a. No meeting of the BTU general membership to debate whether to have a one-day strike was ever held, and accordingly, the membership never voted on whether to conduct a one-day strike. See Appendix, p. 78a.

By order dated July 3,. 2007, the Court dismissed the Union's civil rights counterclaims against the Commission on the ground that the Union had failed to exhaust administrative remedies. See Appendix, p. 61a. In an earlier case, Labor Relations Commission v. Chelsea Teachers Union, 400 Mass. 120, 123 (1987), the Supreme Judicial Court ruled that a union's failure to invoke a statutory impasse procedure designed to resolve contract disputes rendered a challenge to the facial validity of Section 9A premature. The Union's failure to invoke that statutory impasse procedure to resolve the contract dispute in this case deprived it of the right to bring its constitutional counterclaims. By order dated December 31, 2007, the Court dismissed the Union's civil rights claims against the individual Commissioners on the grounds that the Union had failed to exhaust administrative remedies, essentially the same rationale applied in dismissing the claims against the Commission, and that the Commissioners enjoyed qualified immunity from suit. See Appendix, pp. 68a-70a.

The Union sought review in the Massachusetts Appeals Court, the intermediate appellate court of the Commonwealth, which issued its decision affirming the trial court's decisions on June 25, 2009. See Appendix, p. 71a. The Union then sought discretionary review by the Supreme Judicial Court, the highest court of the Commonwealth. The petition for review by the Supreme Judicial Court was denied by order dated September 30, 2009. See Appendix, pp. 82a-83a.

ARGUMENT

I. CONTENT BASED REGULATIONS OF SPEECH AND ASSEMBLY ARE REVIEWED UNDER THE STRICTEST STANDARD AND MUST BE ACCOMPLISHED BY THE LEAST RESTRICTIVE MEANS AVAILABLE.

This Court has stated that the free speech and association rights embodied in the First Amendment are at the foundation of a free society. See Buckley v. Valeo, 424 U.S. 1, 25 (1976) (quoting Shelton v. Tucker, 364 U.S. 479, 486 (1960)). Accordingly, laws enacted by state legislatures which infringe upon protected speech or association must be directed at accomplishing a compelling government objective and must be "closely drawn" or "narrowly tailored" to achieve that objective. See Buckley v. Valeo, 424 U.S. 1, 25 (1976) (noting that action that may curtail these freedoms is subject to the "closest" scrutiny); see U.S. v. Playboy Entertainment Group, Inc., 529 U.S. 803, 813 (2000) (explaining the standard of review applicable to content based restrictions of speech).[3] Where a statute is susceptible to different constructions, a court interpreting that law must, when possible, adopt an interpretation which comports with the Constitution rather than striking the law altogether. See United States v. Delaware & Hudson Co., 213 U.S. 366, 407-08 (1909).

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[3] This case does not implicate the doctrine regarding the reasonableness of the time, place and manner of restrictions on speech because the restrictions on speech and assembly imposed by the Commission and enforced by the courts of the Commonwealth in this case were without such qualification.

Strict scrutiny requires courts, when reviewing statutes which infringe upon protected speech and which are directed at a compelling governmental objective to adopt an interpretation which imposes the least burden on protected speech and activity. See Playboy Entertainment Group, Inc., 529 U.S. at 813. This case presents a situation in which the state statute does not on its face impose any restrictions on speech, but instead it directs the state agency charged with administering it to "set conditions" if the agency finds an "employee organization", usually a labor union, has violated the statute by conducting an employee strike or by encouraging or condoning a strike. See M.G.L. c. 150E, § 9A. While the Labor Relations Commission had observed an interpretation of the statute that comported with the First Amendment for many years prior to this litigation, in this instance, the agency departed from its precedents and applied the statute in a way that set conditions in violation of the Constitution as interpreted and applied by this Court. The construction of the statute given by the Commission in this instance must be overruled, therefore, even if the statute itself need not be discarded. See Delaware & Hudson Co., supra, 213 U.S. at 407-08.

The lower courts that have passed on this matter heretofore have mistakenly concluded that because it is lawful for state governments to restrict public employees from striking, the agency charged with conducting "strike investigations" under the Commonwealth's public employee labor relations statute, M.G.L. c. 150E, § 9A, has carte blanche to restrict the speech and free association rights of those employees in order to prevent a strike from occurring. See Appendix, pp. 80a-81a. That

interpretation, and the orders and injunctions issued pursuant thereto, have the sole and direct effect of chilling speech and exercise of free association rights by public employees, and is so heavy handed that it raises grave concerns about what measures the government may employ to suppress the mere possibility of a strike by public employees in the future. See Brandenburg v. State of Ohio, 395 U.S. 444, 448-49 (1969). The courts that have thus far passed on the constitutionality of the Commission's application of M.G.L. c. 150E, § 9A in this matter have, in effect, decided that because the statute has at least one interpretation that comports with the Constitution, all of its possible interpretations comport with the Constitution. That is a lazy and reckless misapplication of logic that cannot be allowed to stand. The construction of the statute adopted by the Courts below conflicts with the prior decisions of this Court, and must be overruled.

It is important to note that the Appeals Court utterly failed to explain why the Commission was relieved of the duty to construe the statute in the manner that is least restrictive of protected rights. See Shelton v. Tucker, supra, 364 U.S. at 488-89. Even if a less stringent standard of review applied, the Appeals Court was still required to determine whether the construction given to M.G.L. c. 150E, § 9A was narrowly tailored to accomplish a legitimate state purpose. See id. The Appeals Court made no such finding. Instead, it summarily concluded that the Commission simply discharged the duty delegated to it by the Legislature to prevent a public employee strike, and made no findings concerning the means the Commission employed to accomplish that objective or the role the trial court played in effectuating the Commission's orders.

II. GOVERNMENT AGENCIES EMPOWERED TO REGULATE CONDUCT MUST BE MINDFUL OF THE DISTINCTION BETWEEN ADVOCACY OF AN ILLEGAL ACT, WHICH IS PROTECTED BY THE FIRST AMENDMENT, AND ACTION DIRECTED AT UNDERTAKING AN ILLEGAL ACT, WHICH IS NOT CONSTITUTIONALLY PROTECTED.

The decisions of this Court teach that in determining the permissibility of a statute or an act taken by a government agency which hampers speech or other conduct protected by the First Amendment, it is necessary to distinguish between advocacy of an otherwise illegal act and action designed to commit or incite commission of an illegal act. See Brandenburg, 395 U.S. at 448-49. This Court stated in Brandenburg that "a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action ... falls within the condemnation of the First and Fourteenth Amendments." Id. at 449. In deciding Brandenburg, this Court echoed Noto v. United States, 367 U.S. 290, 297-98 (1961), decided less than a decade earlier: "[T]he mere abstract teaching of the moral propriety of or even moral necessity for a resort to violence, is not the same as preparing a group for violent action and steeling it to such action." The failure of the state courts to distinguish between advocacy and action in the current context resulted in their wholesale adoption of the Commission's prohibitions against protected speech and assembly.

Shortly after Brandenburg, this Court reiterated the distinction between advocacy and action in the First Amendment context in Healy v. James, 408 U.S. 169, 192 (1972). The question in Healy was whether the President of Central Connecticut State College imposed an unconstitutional prior restraint of students' protected speech and association rights when he denied official recognition of a campus chapter of Students for a Democratic Society, a group nationally known for having at least some members who espoused illegal activity as a form of protest. See id. at 170-71. The Court stated plainly,

> [T]he critical line for First Amendment purposes must be drawn between advocacy, which is entitled to full protection, and action, which is not. Petitioners may, if they so choose, preach the propriety of amending or even doing away with any or all campus regulations. They may not, however, undertake to flout these rules.

Id. at 192.

The Court further articulated its decision, considering the larger First Amendment context, writing:

> [I]t has been established that "guilt by association alone, without (establishing) that an individual's association poses the threat feared by the Government," is an impermissible basis upon which to deny First Amendment rights. The government has the burden of

> establishing a knowing affiliation with an organization possessing unlawful aims and goals, *and a specific intent to further those illegal aims*.

Id. at 186 (citation omitted) (emphasis added).

The First Amendment is a shield for the citizen against overzealous government intrusion. See id. at 187-88 (advising that the Government "may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent."). That is true even where the Government's distrust of a group is arguably well-founded. See id. at 188. The Government may regulate "advocacy 'directed to inciting or producing imminent lawless action and ... likely to produce such action,'" but it may not regulate advocacy which raises no such risk. See id. (quoting Brandenburg, 395 U.S. at 447).

A. Rather than performing any real analysis of the First Amendment mandated by the decisions of this court, the intermediate appellate court of the Commonwealth summarily disposed of the Union's civil rights claims because the Commonwealth's prohibition of strikes by public employees is lawful.

The decision of the state Appeals Court, which the Supreme Judicial Court in effect upheld by its refusal to hear the matter on an application for further review, is fatally defective in a variety of ways. The Appeals Court used as operative premise

for its analysis that it is lawful for states to prohibit public employees from engaging in strikes. See Appendix, pp. 80a-81a. The Appeals Court then found that the injunction entered by the trial court prohibited the Union from conduct that is prohibited by G.L. c. 150E, § 9A. See Appendix, pp. 80a-81a. The Appeals Court concluded from those premises that the injunction placed no prior restraint upon protected speech. See Appendix, p. 81a. Such an example of circular logic is rare in case law. The Massachusetts Appeals Court, in a mere two paragraphs, assumed that the injunction issued by the trial court and the law under which it issued were constitutional, and directly drew the inference that any application of the statute must be constitutional.

The Appeals Court bypassed any discussion of the standard of review applicable to the Union's civil rights claims. Instead, it opined "to the extent that the conduct regulated by § 9A 'includes both 'speech' and 'nonspeech' elements, the purpose of the statute is entirely unrelated to the suppression of free expression'". See Appendix, p. 81a. Rather than justifying this conclusion, the Court summarily declared that the governmental interest in preventing a strike by the teachers of Boston Public Schools from occurring was "substantial", and any incidental infringement of First Amendment freedoms due to enforcement of the statute is lawful. See Appendix, p. 81a. The Appeals Court failed to explain how a debate among the Union membership on whether a strike should be held is anything more than pure speech. Whatever nascent "nonspeech" elements of Union conduct the Commission feared had yet to materialize and neither the Commission nor the courts were entitled to enter orders based on

speculation about what might happen. Healy, supra, 408 U.S. at 186.

The Appeals Court also stated that the injunction placed no restrictions on the Union's ability to engage in public speech or debate, and therefore, imposed no prior restrain of speech or conduct protected by the First Amendment. See Appendix, p. 81a. Remarkably, the Appeals Court made that startling statement in the context of a case in which, in response to the Union's declarations of dissatisfaction with the state of negotiations and its mere scheduling of a membership debate on whether a strike should be held, the Commission convened a hearing, set conditions requiring the Union to take affirmative steps to revoke its resolution scheduling the debate and sought and obtained summary, verbatim enforcement of its orders in the trial court. Indeed, the trial court imposed a large coercive fine to compel the Union to comply. The Appeals Court's wry observation that the Union, having been fined $30,000 a day for failing to repudiate its debate resolution, was free to publicly debate the merits of a strike without fear of action by the Government, reveals its unwillingness to rigorously examine the constitutional issues raised herein.

More generally, the Appeals Court's decision fails completely to acknowledge the distinction between advocacy of possible acts of civil disobedience and concrete action taken to effectuate an illegal act. See Brandenburg, supra, 395 U.S. at 448. While the Appeals Court decision acknowledges that ultimately there was no debate held to discuss the merits of a strike and that no strike occurred, it treats the occurrence of a strike as an inevitability

set in motion by the executive board scheduling the debate in December 2006. See Appendix, p. 78a. The decision suggests that once the Union approved the motion scheduling a debate for February 14, 2007, the Commission had license to impose any restrictions it thought were necessary to prevent a strike from occurring, without regard for anything that might have happened in the weeks leading up to the scheduled debate. See Appendix, p. 78a. That view ignores that there was no possibility of a strike by BTU members occurring until they met to debate and vote on February 14, 2007. While it is inaccurate to state that the Union "advocated" for any particular action by its approval of the motion scheduling a debate in December 2006, assuming its communications and the steps it took to schedule the meeting were "advocacy" within the meaning of the law, it is unreasonable to say the Union was "steeling" the membership to do anything except discuss what to do in response to the employer's bargaining stance. See Brandenburg, supra, 395 U.S. at 448.

III. THIS CASE PRESENTS AN IMPORTANT QUESTION OF HOW THE FIRST AMENDMENT APPLIES TO ACTIONS BY AGENCIES OF STATE GOVERNMENT AND THE EXTENT TO WHICH VALID RESTRICTIONS ON SPEECH AND ASSEMBLY MAY BE ASSERTED IN A PREEMPTIVE FASHION BY STATE ACTORS.

This Court should grant the current petition because the decision of the Massachusetts Appeals Court conflicts with prior decisions of this Court

within the meaning of Supreme Court Rules, Rule 10(c). Guidance from this Court will hopefully remediate the Appeals Court's failure to apply the correct standard of review to the constitutional question raised by the Union's civil rights claims.

A. The lower courts have not applied the strictest level of scrutiny in reviewing the constitutional issues, and accordingly, have dismissed the civil rights claims too readily.

The trial court attempted to sidestep the Petitioners' constitutional claims in this matter by making an incorrect application of the doctrine of administrative remedies. The trial court's reliance on Chelsea Teachers Union, supra, 400 Mass. 120, in dismissing the Union's civil rights claims is troubling as the public employees involved in the prior case actually went on strike. In this matter, the Union was hailed before the Commission right after it had scheduled a membership debate and long before a strike could have happened.[4] While the

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[4] The decision dismissing the Union's claims against the individual Commissioners also stated the Commissioners enjoy qualified immunity from suit. It is undisputed that in this case the Commission departed from its longstanding interpretation of M.G.L. c. 150E, § 9A which held that a strike is not "about to occur" within the meaning of the statute until there is no further union action necessary for a strike to occur. Accordingly, the question whether the Commissioners have a valid sovereign immunity defense is subsumed within the larger question of whether the newly announced interpretation passes constitutional muster. Under the former interpretation of § 9A, on which the Union relied in approving the motion scheduling a debate for February 14, the last step necessary for

Appeals Court correctly abstained from applying either the exhaustion of administrative remedies doctrine or the qualified immunity defense, it is critical to note that the trial court never explained why the interpretation of M.G.L. c. 150E, § 9A the Commission had long observed, which is less restrictive of protected speech and assembly than the interpretation newly announced in this matter, was discarded.

The Commission's former interpretation of § 9A, suddenly abandoned in the memorandum labeled "Final Order 9A Proceedings", held that no strike was "about to occur" within the meaning of the statute until there was no further union action required for a strike to ensue. See Appendix, pp. 78a-79a. That standard for determining whether M.G.L. c. 150E, § 9A has been violated is far less restrictive of protected rights than the standard adopted by the Commission in this case in several regards. First, and perhaps most obviously, the former standard permits the Union officers, executive board members and rank-and-file members to communicate openly and honestly about the state of their relations with the School Committee as employer. An open a frank discussion concerning all strategic options available to the Union in its effort to negotiate a contract with the School Committee is essential to smooth conduct

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a strike to occur would have been a membership vote, which is required for a strike under the Union's bylaws. Accordingly, the decision of this Court on whether the Commission may "set conditions" upon finding that a membership debate has been scheduled will dispose of the question whether the Union had a clearly defined right to meet and debate the merits of a strike, regardless of the legality of the nascent strike. The Commissioner's entitlement to a qualified immunity defense depends on whether such right was clearly established.

of labor relations and is consistent with the democratic ideals and organization of the Union. The construction of M.G.L. c. 150E, § 9A adopted in the current matter chills the exercise of free speech, undermines open and honest communication and deprives all parties of the fruits of a free exchange of ideas.

Less obviously, but of no less importance, the former standard applied by the Commission to determine when a strike is "about to occur" allowed union members to debate and vote on whether to strike before the Commission set conditions designed to bring the union in compliance with the law. That is, the acts of protected speech and association the Union complains have been infringed upon in this matter would have been allowed to occur unimpeded under the previous standard. Hence, under the former standard, there was no concern that a First Amendment violation of the type at issue here would occur.

The Massachusetts Appeals Court was satisfied that the conditions set by the Commission were lawful because it is charged with preventing strikes from occurring in contravention of M.G.L. c. 150E, § 9A. See Appendix, pp. 78a-79a. In the Appeals Court's view, if the Commission waited until a strike was literally about to occur - i.e. waited until the school doors were about to open on the day of a prospective strike - or until a strike had already commenced to set conditions designed to bring the Union in compliance with the law, the statute would be rendered wholly ineffective. See Appendix, pp. 78a-79a. In essence, the Appeals Court believes that the Commission is charged with preventing strikes from commencing altogether, and an interpretation of the statute that results in the Commission

preventing a strike from continuing is simply not faithful to its statutory mission. Clearly, a less wooden interpretation of the statute would be less restrictive of the Union's First Amendment guarantees.

The Appeals Court failed to acknowledge that simply because the motion approved by the executive board mentioned February 15 as a potential day for the commencement of a work stoppage, the motion also allowed for the possibility of no strike or a one-day strike on another day if the membership so voted. The Commission and the courts acted preemptively, placing a prior restraint on protected speech and assembly due to speculation about what they believed might happen if the Union met to debate the merits of a one-day strike. While the state Commission is charged with setting conditions to prevent strikes, its statutory mission must yield to the guarantees of the First Amendment. A union must be allowed to gather and debate a contemplated act of civil disobedience before it may be punished for undertaking the same.

B. The Commission's orders, as enforced by the courts, have a chilling effect upon the Union's exercise of speech, and it is now unknown what the Union may say without being at risk for violating the law.

The Commission's decision and orders in this matter, as upheld by the courts of the Commonwealth, have the intent and effect of chilling exercise of protected speech by the Union. The

Commission expressly relied on statements made in an "E-Bulletin" sent by the Union leadership to the membership by electronic mail in determining the Union violated M.G.L. c. 150E, § 9A. See Appendix, p. 19a. Specifically, the Commission found the statements "That's unacceptable" and "We're not going backwards" in reference to the School Committee's bargaining proposals were "incendiary" and designed to stir the membership to illegal actions. See Appendix, p. 19a.

> This Court has unequivocally stated that: [a]ll speech restraining injunctions are prior restraints in the literal sense of 'administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.'.... Precedent shows that a speech-restricting 'injunction' that is not issued as a remedy for an adjudicated or impending violation of law is also a prior restraint in the condemnatory sense, that is, a prior restraint of the sort prohibited by the First Amendment.

See Lawson v. Murray, 515 U.S. 1110, 1113 (1995) (Scalia, J., memorandum decision) (quoting from Alexander v. United States, 509 U.S. 544 (emphasis omitted)); see also Healy, supra, 408 U.S. at 184 (noting that by depriving a student group of official recognition, a state-funded college imposed a prior restraint upon the student organization by denying it access to associational activities arising by virtue of official recognition). The Appeals Court's assertion that the Union was free to engage in a

public debate on the merits of a strike despite the Commission's orders and the injunction imposed by the trial court wholly ignores the coercive impacts of those orders. The Commission set conditions in the first instance based on simple expressions of frustration by the Union leaders to the membership concerning progress of contract negotiations and the scheduling of a meeting to debate a possible strike – were the Union to proceed with a debate on whether to strike after the court issued the contempt order, it would have done so under pain of serious sanctions.

Restraining a union's leadership from expressing frustration with the progress of contract negotiations to its own members is a direct assault on the First Amendment. Further, enforcement of the Commission's orders eviscerated the Union's protected right to discuss a contemplated act of civil disobedience. See Healy v. James, 408 U.S. 169, 192 (1972). The order to rescind and disavow the motion setting a date for debate and a vote by the membership are the mirror image of an order that the Union must not convene a meeting to discuss and debate the merits of a strike nor vote on the question whether there should be a strike. Any suggestion that there was no prior restraint of First Amendment rights, is therefore, plainly erroneous. See Appendix, p. 81a. The Commission's "Final Order 9A Proceedings" made clear its belief that by characterizing the School Committee's bargaining positions as "unacceptable" and declaring "We're not going backwards," the Union guaranteed that a strike was "about to occur". Accordingly, it is clear the Commission did impose a prior restraint of protected speech and association of the Union.

It is evident that the School Committee and the Commission were both made uncomfortable by the Union's contemplation of an act of civil disobedience. That discomfort was revealed by the overreaction of the School Committee and the Commission to the mere possibility of a one-day strike ensuing from the debate. The School Committee invoked the Commission's assistance via a strike investigation petition in early January, as soon as it learned the Union had scheduled a debate. Rather than requesting additional bargaining sessions or petitioning for mediation of the labor dispute the School Committee opted for preemptive state action. The Commission, in its "Final Order 9A Proceedings", posited grave and varied catastrophes to the City of Boston if a one-day teacher strike were to occur. See Appendix, p. 21a (stating that "incalculable harm and chaos" would be caused by a strike). This is plainly disingenuous as the possibility of a one-day strike occurring was known more than a month in advance of the scheduled debate – the average winter storm in New England can cause cancellation of school with far less notice, yet somehow "chaos" is always - and routinely - averted.

Even a governmental agency discomforted by a union's contemplation of civil disobedience may not overreach its constitutional boundaries. See Healy, supra, 408 U.S. at 185-86 ("[T]he Court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization."). The First Amendment condemns use of the law as a preemptive weapon against governmental worry – citizens are free to ponder, even loudly, the

possibility of committing an act of civil disobedience. See id. at 187-88. It is only when the speaker rouses his listeners to illegal action that he steps outside the protections of the First Amendment. Until then, the Government must find other ways to cope with its discomfort.

This Court should exercise its jurisdiction to decide whether the Union's civil rights claims are valid. Indeed, because the Commission expressly declined to entertain the constitutional issued raised herein and the trial court dismissed the Union's civil rights claims on jurisdictional grounds, and because the Appeals Court brushed off the constitutional issues without any meaningful discussion, this Court, if it grants the petition, will rightfully conduct the first full hearing of the constitutional issues, and hopefully, furnish guidance in a way that restores the right of public employees to discuss ideas that the Government finds unsettling.

Respectfully submitted,

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Dated: December 29, 2009

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APPENDIX A

MLRC Administrative Law Decisions—2007

In the Matter of BOSTON TEACHERS UNION, LOCAL 66, AFT - MASSACHUSETTS, RICHARD STUTMAN, in his capacity as President, PATRICK CONNOLLY, in his capacity as Executive Vice President, EDWARD A. WELCH, in his capacity as Secretary-Treasurer, MICHAEL MCLAUGHLIN, in his capacity as Elementary Field Representative and Executive Board Member, CAREN CAREW, in her capacity as Secondary Field Representative and Executive Board member, JENNA FITZGERALD in her capacity as Paraprofessional/Substitute Field Representative and Executive Board member, PATRICIA ARMSTRONG, in her capacity as Political Organizer and Executive Board member, ROB CARROLL, ISILDA COLONETTE, ANGELA CHRISTIAN, ALLISON DOHERTY-LACASSE, DEE ESPOSITO, MARY F. GLYNN, ROBERT F. JANGO, CHARLIE JOHNSON, CHERYL L. KELLY, MICHAEL MAGUIRE, JAMES PHILIP, and MARY ANN URBAN, in their capacities as Executive Board members

and

BOSTON SCHOOL COMMITTEE

Case No. SI-07-272

82.12	***other affirmative action***
82.4	***bargaining orders***
92.45	***motion to re-open***
92.47	***motion to dismiss***

108.4	***selling requirements under Chapter 150E, Section 9***
108.5	***strikes – sufficiency of charge***
108.8	***constitutionality***

January 18, 2007

John F. Jesensky, Chairman
Hugh L. Reilly, Commissioner
Paul T. O'Neill, Commissioner

Matthew Dwyer, Esq.	*Representing the Boston Teachers Union, Local 66, AFT- Massachusetts, and its officers and Executive Board members*
Elizabeth Valerio, Esq. *Robert M. Spiegel, Esq.*	*Representing the Boston School Committee*

FINAL ORDER
9A PROCEEDINGS

On January 9, 2007, the Boston School Committee (School Committee) filed a petition with the Labor Relations Commission (Commission) for a strike investigation (Petition) pursuant to Section 9A(b) of Massachusetts General Laws, Chapter 150E (the Law). The Petition alleges that the Boston Teachers Union, Local 66, AFT - Massachusetts (Union) is about to engage in a strike, and that the Union, its officers, and its Executive Board members have induced, encouraged, and condoned a strike, work stoppage, or withholding of services in violation of Section 9A(a) of the Law. The Commission conducted an investigation of the Petition on

January 11, 2007. Both parties had an opportunity to be heard, to examine witnesses, and to introduce evidence. The investigation was closed on January 11, 2007.

Motion to Dismiss

During the investigation, the Union filed a motion to dismiss the strike petition (Motion To Dismiss) on the grounds that the School Committee failed to show that a strike is occurring or about to occur within the meaning of Section 9A(b) of the Law. The Union filed a memorandum of law in support of its Motion to Dismiss on January 11, 2007. The School Committee opposes the Motion to Dismiss and filed a memorandum of law in support of its position on January 11, 2007. Both the School Committee and the Union filed a reply to the opposing party's memorandum of law on January 12, 2007. The Commission has decided to deny the Motion to Dismiss for the reasons stated below.

Motion to Reopen

The Union also filed a motion to reopen/augment the record on January 11, 2007 (Motion to Reopen) to accept affidavit testimony from the Union President about the intended meaning of the Union's communications about Fairness Friday. In support of its Motion to Reopen, the Union states that the affiant was not available to testify at the investigation on less than twenty-four hours notice and that Union counsel was unable to confer directly with the Union President until after the investigation had concluded.

The School Committee filed its opposition to the Motion to Reopen on January 12, 2007. The School Committee opposes the Motion to Reopen because: 1) the Union has not adequately supported its contention that the Union President was not available to attend the January 11, 2007 investigation; and 2) it does not have an opportunity to cross-examine the Union President about the information contained in his affidavit.

The Commission has decided to deny the Motion to Reopen because: 1) the School Committee has not had the opportunity to cross-examine the Union President on the content of his affidavit; and 2) the Commission declines to permit the parties to backfill the record testimony through affidavits on issues that are material to the Commission's determination of whether the named respondents have violated Section 9A(a) of the Law.

Parties' Stipulations

1. The City of Boston (City) is a public employer within the meaning of Section 1 of M.G.L. c. 150E (the Law).

2. The Boston School Committee (School Committee) is the collective bargaining representative of the City for the purpose of dealing with school employees.

3. The Boston Teachers Union, Local 66, AFT - Massachusetts (Union) is an employee organization within the meaning of Section 1 of the Law.

4. The Union represents teachers, nurses, and certain other professional employees, para-

professionals and certain substitute teachers who work for the Boston School Committee.

5. The School Committee and the Union were parties to collective bargaining agreements effective September 1, 2003 and continuing in full force and effect through August 31, 2006.

6. The School Committee and the Union have been negotiating since January 2006 for successor collective bargaining agreements.

7. Michael Contompasis (Contompasis) is the Superintendent for the Boston public schools.

8. Richard Stutman (Stutman) is president of the Union.

9. Patrick Connolly is the executive vice-president of the Union.

10. Edward A. Welch is the secretary-treasurer of the Union.

11. Michael McLaughlin is the Union's elementary field representative and a member of the Union's Executive Board.

12. Caren Carew is the Union's secondary field representative and a member of the Union's Executive Board.

13. Jenna Fitzgerald is the Union's paraprofessional /substitute field representative and a member of the Union's Executive Board.

14. Patricia Armstrong is the Union's political organizer and a member of the Union's Executive Board.

15. Rob Carroll, Isilda Colonette, Angela Christiani, Allison Doherty-Lacasse, Dee Esposito, Mary F. Glynn, Robert F. Jango, Charlie Johnson, Cheryl L. Kelly, Michael Maguire, James Philip, and MaryAnn Urban are members of the Union's Executive Board.

16. The Union maintains a web site at www.btu.org.

Findings of Fact

Based upon the investigation conducted, the Commission makes the following findings of fact:

There are about 149 schools in the Boston public school system, and about 58,000 students attend the Boston public schools. The Union represents about 8,000 School Committee employees. Friday, January 19, 2007 and Thursday, February 15, 2007 are full school days for the students who attend the Boston public schools and full work days for the teachers, nurses, certain other professional employees, paraprofessionals, and certain substitute teachers who work for the School Committee and who are represented for the purposes of collective bargaining by the Union.

Union By-laws

The Union maintains a by-law provision, Article X, Section 1.(b), stating, "A general membership meeting is the only body which may accept or reject contracts or call a work stoppage."

Contract Provisions

Article V.E.2(b), *Length of the School Day*, of the collective bargaining agreement that contains the terms and conditions of employment for teachers (Teachers Contract) states:

> (b) The fifteen minutes before and fifteen minutes after school time for teachers shall be reduced to a total of twenty minutes, ten minutes before and ten minutes after school. The faculty, by a majority vote and with the approval of the principal, may change the allocation of the twenty minutes before and after school time.

According to Contompasis, the intent of this contract language, above, is that the ten minutes before the time the students start school and the ten minutes after the school time ends for the students would be the standard in the Boston public school system for the teachers covered by the contract. Any variation from that standard would have to be done in accordance with the contractual procedure, that is, "[t]he faculty, by a majority vote and with the approval of the principal, may change the allocation of the twenty minutes before and after school time."

Article II. A., *Work Schedule and Duties*, of the collective bargaining agreement that contains the terms and conditions of employment for the substitute teachers (Substitute Teachers Contract), in part, states:

> Substitute teachers will generally be required to perform the work schedules and duties, in and out of the classroom, of the regular teacher who is being covered by the substitute; provided,

> however, the teacher assignment procedures, teacher program guidelines, and teaching load provisions of the teachers' contract shall not be considered as established policy or binding contractual commitment. No long term substitute teacher may be assigned teaching periods or administrative duties in excess of the maximum allowed for other teachers in the building.

Article X. F., *Resolution of Differences by Peaceful Means*

> The Union and Committee agree that differences between the parties shall be settled by peaceful means as provided within this Agreement. The Union, in consideration of the value of this Agreement and its terms and conditions and the legislation which engendered it, will not engage in, instigate, or condone any strike, work stoppage, or any concerted refusal to perform normal work duties on the part of any employee covered by this Agreement.[1]

Union Bulletin #22

On or about January 4, 2007, the Union posted on its web site E-Bulletin #22 (Bulletin #22) dated January 4, 2007. Bulletin #22 states, in part:

> **Fairness Friday event** on 1/19, with more details to be announced later. We ask all staff to picket BEFORE entering school on Friday 1/19.

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[1] The same provision is contained in the teachers' agreement, the paraprofessionals' agreement, and the substitute teachers' agreement (Joint Exhibit 1)

> We will then enter right at the beginning of school, no earlier. You will have all week to prepare for the shortened school day. At the end of the school day we will have another activity planned, which we will announce. Picket signs will be available at the BTU membership meeting on 1/10. (Emphasis in the original.)

Stutman signed Bulletin #22 in his capacity as Union president.

Emergency Union Bulletin #23

On or about January 6, 2007, the Union posted on its web site Emergency BTU E-Bulletin #23 (Bulletin #23) dated January 6, 2007. Bulletin #23 states:

> Good morning: Today the Boston Teachers Union is announcing a motion that our Executive Board approved on December 20. The motion passed our 19-member Executive Board unanimously after a two-hour discussion. The motion speaks for itself.
>
> > **Motion: To place before the membership on February 14, 2007 for discussion, consideration, and debate by that body, in accordance with the bylaws, the question whether there should be a one-day strike on February 15, 2007 or on such other dates as may be chosen by the membership.** (Emphasis in the original.)

We have been at the bargaining table since January 27, 2006 and have spent hundreds of hours over 30 plus sessions. The sessions have not been productive

and we are still far apart on key issues. We have presented to management a thoughtful bargaining proposal that is both reasonable and fair to our members. Our proposal will improve both our teaching conditions and our students' learning conditions. Their proposal improves neither. The truth is, their proposal is insulting to us and harmful to the children we teach. Consider the following:

• The School Committee wants to increase class size by two students per classroom across the board. The committee also wants to eliminate the following sentence from our contract: "Ultimately, the classroom teacher may insist that the class size maximum be enforced." Keeping class size limits is most important to us, and here is an example why:

In 1986-7 the class size limit in grades 6-8 was 36 students per class. Today is 28. It has taken us 20 long, hard years of negotiating to get this far. Our effort has been good for us and the students we teach. The school committee now wants to increase class size in middle schools to 30, as part of its proposal to increase class size in every classroom throughout the city. We're not going backwards.

• Both the union and the school committee want to improve under-performing schools. We each have items on the table that the other can live with. But the committee actually has an item on the table that states that a principal in any of the 20 schools deemed as superintendent's schools can remove a teacher who has a bad "attitude" - one who 'may not adopt and embrace the (principal's) reform strategy.' We all

question, we all think, we all will have a bad 'attitude' from time to time.

• Lastly, on the issue of health insurance... We are sympathetic to the rising costs of health insurance. We are willing to work with the city to help control costs. In fact, we have hired arguably the foremost health insurance expert in the state to advise us. But the committee's proposal to double the cost of HMO insurance coverage while offering only a small salary increase will cause a loss in take-home pay for many of our members. That's unacceptable.

We have been firm but reasonable. We wish to settle this contract. But we have been treated with disrespect. The school committee has taken good care of principals most of whom who have received a salary increase of more than double what we have been offered over a *shorter* time period. We seek equal treatment.

The school committee is apparently willing to foist the contract settlement on the new superintendent, using stall and crawl tactics. We are not. The committee ought to come to the table and make a good faith effort to settle this contract. We remain willing to meet around the clock.

As per the Executive Board motion, over the next five weeks, we will be preparing for all exigencies that could result.

1. The next monthly membership meeting is this Wednesday, 1/10, at 4:00.

2. Friday, January 19, will be **Fairness Friday**. More information will be forthcoming.

3. Until we have a contract settlement, *Work for Fairness* will continue.

4. There is an emergency Area Captains meeting on Thursday, 1/11, at 4:00.

5. There is an emergency, sign-in Building Representatives meeting on Thursday, 2/1, at 4:00.

6. On February 14 at the regularly scheduled membership meeting, the above motion will be discussed, considered and debated in accordance with our by-laws.

7. Please circulate this to your friends and colleagues and tell them that we need their *home* email address. They can sign up here.

(Emphasis in the original.)

Stutman signed Bulletin #23 in his capacity as Union president.

On Saturday, January 6, 2007, Stutman telephoned Contompasis at his school department office.[2] During

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[2] Contompasis has served as the Superintendent of the Boston public schools since May of 2006. Contompasis has worked for the School Committee for about forty-two years, serving as: 1) the Chief Operating Officer for the Boston public schools from 1998 to May of 2006; 2) the headmaster for the Boston Latin School from 1976 to 1998; and 3) a teacher in the Boston public schools for about ten years prior to 1976.

this telephone conversation, which lasted about three to four minutes, Stutman notified Contompasis that, on December 20, 2006, the Union's Executive Board had voted to take a motion to the membership to take a strike vote on February 14, 2007, with a strike date of February 15, 2007, if the motion passed. Contompasis thanked Stutman for the "heads up."

Stutman did not discuss Fairness Friday on January 19, 2007 (Fairness Friday) with Contompasis either during this January 6, 2007 telephone conversation or at any other time. Contompasis's knowledge about Fairness Friday, including whether the Union is going to have teachers report late for their work day on that date, is limited to the information that is contained in the Union's bulletins. Contompasis regularly and routinely receives communications from the Union by electronic mail and he received both Bulletin #22 and Bulletin #23 from the Union by electronic mail.

Union Bulletin #24

On or about January 11, 2007, the Union posted on its web site E-Bulletin #24 (Bulletin #24) dated January 11, 2007. Bulletin #24 states, in part:

> Yesterday the BTU membership voted in approval of the below motion, which notices the membership that another vote will be taken after consideration, debate, and discussion, at the February membership meeting. The motion is self-explanatory. Yesterday's meeting was highest-attended membership meeting in over two years, with more than 650 people in attendance. The vote yesterday was unanimous,

surprising many. The maker of the motion spoke in support of the motion. No one spoke against it. The motion follows:

> **Motion: To place before the membership on February 14, 2007 for discussion, consideration, and debate by that body, in accordance with the bylaws, the question whether there should be a one-day strike on February 15, 2007 or on such other dates as may be chosen by the membership.** (Emphasis in the original.)

• Friday, 1/19, is ***Fairness Friday***, 1/19/07; Logistics - meet outside your school in the AM, don't go into school, picket outside school for 20 minutes and walk in as a group precisely at teacher or Para sign-in time. This is not a violation of any school department rule or regulation. You are free to do what you want on your time. The informational picketing outside each school is a way to show **BTUnity**. This is a most important event and we ask that all participate. We ask that you give 20 minutes of your time outside the building to send Court St. a clear message that class size and health insurance are important issues to our membership. (Emphasis in the original.)

Stutman signed Bulletin #24 in his capacity as Union president.

System-wide protocol requires staff to sign in when they report to work each day. These automated records are reviewed occasionally by school headmasters to monitor the teachers' compliance

with the before-school requirements found in Article V.E.2(b), *Length of the School Day*. There is no system-wide protocol that requires staff to sign out at the end of the day. Rather, the sign-out procedure varies by school.

Discussion

Section 9A of the Law[3]

Section 9A(a) of the Law states:

> No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall induce, encourage or condone any strike, work stoppage, slowdown or withholding of services by such public employees.

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[3] The Commission declines to address the constitutional issues raised by the parties for three reasons. First, the Commission is obligated to presume the constitutionality of the Law it administers. Second, there is no indication that either party notified the Attorney General that the constitutionality of the Law was being attacked, and so the Attorney General has had no opportunity to defend the constitutionality of the Law. Third, the Union has explicitly waived the right to engage in a strike or work stoppage by its agreement to resolve differences by peaceful means, Article X.F. of the parties' collective bargaining agreement. Were we called upon to address this issue, we would find that the Law is constitutional, because there is a compelling public interest in preventing strikes and strike threats, there are several reasonable alternatives for the employee organization to communicate its message and have the issues that separate the parties resolved, and, in this context, the restrictions upon strikes and strike threats are the least restrictive of the union's free speech rights, and are directed to the employee organizations actions and not pure speech.

Section 9A(b) of the Law states:

> Whenever a strike occurs or is about to occur, the employer shall petition the commission to make an investigation. If, after investigation, the commission determines that any provision of paragraph (a) of this section has been or is about to be violated, it shall immediately set requirements that must be complied with, including, but not limited to, instituting appropriate proceedings in the superior court for the county wherein such violation has occurred or is about to occur for enforcement of such requirements.

Section 1 of the Law defines strike as:

> A public employee's refusal, in concerted action with others, to report for duty, or his [or her] willful absence from his [or her] position, or his [or her] stoppage of work, or his [or her] abstinence in whole or in part from the performance of the duties of employment as established by an existing collective bargaining agreement or in a collective bargaining agreement expiring immediately preceding the alleged strike, or in the absence of any such agreement, by written personnel policies in effect at least one year prior to the alleged strike; provided that nothing herein shall limit or impair the right of any public employee to express or communicate a complaint or opinion on any matter related to conditions of employment.

Fairness Friday - January 19, 2007

The School Committee argues that the Union, its officers, and its Executive Board members violated Section 9A(a) of the Law by unilaterally scheduling a shortened work day on January 19, 2007 and by inducing and encouraging the employees it represents to work a shortened work day on January 19, 2007 as evidenced by certain text of Bulletin #22. Further, the School Committee asserts that the Union did not cure this violation of the Law when, following the filing of the instant strike petition and during the Commission's investigation of the School Committee's petition, the Union issued Bulletin #24.[4]

In *Dedham Education Association, Inc. et. al*, 31 MLC 163 (2005), the Commission decided that the union and its membership were engaged in an unlawful strike when its members left work before the end of their contractual work day and again, when they were engaged in picketing at a time when they were undisputedly required by the terms of their collective bargaining agreement to have begun their work day. *Id.* at 167, *citing, Lenox Education Association v. Labor Relations Commission*, 393 Mass. 272 (1984) (concerted refusal by a school system's teachers to perform services customarily

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[4] Because we find that the text in Bulletin #22 specific to Fairness Friday does not violate Section 9A(a), it is unnecessary to address: 1) the School Committee's argument that Bulletin #24 is not relevant to whether the named respondents violated the Law by issuing Bulletin #22; or 2) the Union's argument that the further explanation about Fairness Friday that is contained in Bulletin #24 effectively clarified Bulletin #22's prior message thus nullifying or curing any alleged violation of Section 9A(a).

required of them constitutes a strike), further citations omitted.

Here, the facts demonstrate that January 19, 2007 is a full school day for the students who attend the Boston public schools and a full work day for the School Committee employees represented by the Union for the purposes of collective bargaining. The facts also establish that Article V.E.2(b), *Length of the School Day*, of the Teachers Contract requires teachers to work an aggregate of twenty minutes before and after school time. Further, Article II.A., *Work Schedule and Duties*, of the Substitute Teachers Contract in part, states that substitute teachers are generally required to perform the work schedules and duties, in and out of the classroom, of the regular teacher who is being covered by the substitute.

Based on these facts, we find that the act of emailing Bulletin #22 to the 8000 unit members asking "all staff to picket BEFORE entering school on Friday, 1/19 . . .[and] then enter right at the beginning of school, no earlier" does not violate Section 9A(a) of the Law. Despite the inclusion of a reference in the bulletin to a "shortened school day," the request to "enter right at the beginning of school" is insufficient, absent other evidence, to establish that a strike or withholding of services is about to occur on January 19, 2007, and that the Union, its officers, and its Executive Board members have induced, encouraged, or condoned any strike, work stoppage, slowdown or withholding of services on January 19, 2007.

Actions Surrounding the February 15, 2007 Strike Vote

The Commission concludes that the Union has violated Section 9A(a) of the Law with respect to the call for a strike on February 15, 2007. That conclusion is based upon the facts presented by the parties. Most pertinent are, the Union's by-laws include a provision that contemplates the initiation of a work stoppage; the Union's Executive Board called for a membership vote on conducting a work stoppage; the Union conducted a preliminary membership vote on holding a second vote on conducting a work stoppage; the Union sent the membership incendiary messages to induce or encourage a work stoppage, including statements that "We're not going backwards" and "That's unacceptable" referring to the School Committee's bargaining proposals (Bulletin #23); and scheduled the second strike vote for 4:00 p.m. on the day before the scheduled strike date, February 15, 2007, effectively denying the School Committee time to present its case to the Commission, for the Commission to deliberate and issue an opinion and order, and then proceed to court to obtain enforcement of the Commission's order. (The Commission's orders are not self-enforcing.) The Union's advocacy for a strike is further shown by Bulletin #24, which reports that the Executive Committee's motion for a strike vote was *unanimously* supported at the January 10, 2007 meeting of 650 Union members.

Based on the parties' stipulations and the facts set forth above, we conclude that a strike, work stoppage, slowdown or other withholding of services is about to occur and that the Union, its officers, and

Executive Board members are inducing, encouraging, and condoning such action in violation of Section 9A(a) of the Law. To the extent our decision here conflicts with prior Commission decisions that required an affirmative strike vote as a prerequisite to a finding that a strike violative of Section 9A either was occurring or was about to occur, the prior decisions are overruled. *See, e.g. Boston School Committee*, 27 MLC 32, 34 (2000); *Brockton School Committee*, 20 MLC 1253, 1258 (1993); *City of Worcester*, 13 MLC 1627, 1630 (1987); *Boston School Committee*, 10 MLC 1289, 1290 (1983). Those decisions required an actual strike vote as a predicate to a finding of violation of Section 9A(a). Such a prerequisite allows for the kinds of strike threats, disruptions, and manipulation of strike votes and strike dates that preclude timely and effective enforcement to prevent, and not merely interrupt, actions that the Law prohibits.

The purposes of the Law, especially Section 9A, are best effectuated by prudent Commission intervention in a labor dispute at a point in time where the Commission may act to set the necessary requirements to prevent an unlawful disruption of public services. Stated otherwise, we decline to withhold preventive action that is specifically authorized by the plain and unequivocal language of Section 9A where the evidence adequately supports a finding that a strike is about to occur. *Town of Walpole*, 12 MLC 1039 (1985).

We construe the phrase "about to occur" that appears in Section 9A(b) to include situations where actions by employee organizations, their officials or members demonstrate that an actual threat of strike, work stoppage, or slowdown exists so that

public officials would reasonably engage in contingency planning, to prevent the interruption of important public services. Although a strike vote incontrovertibly establishes a violation of Section 9A of the Law, other facts and circumstances, such as those found here, exist that are reasonably construed as constituting "induce[ment], encourage[ment] or condon[ation of] any strike, work stoppage, slowdown or withholding of services by such public employees" and should be disavowed. *Town of Walpole*, above.

Unquestionably, by approving a motion to bring a strike vote to the general membership, the Union, its officers, and its Executive Board members have started in motion the approval and authorization by a vote of the general membership to engage in a one-day strike as early as February 15, 2007. A strike by 8,000 School Committee employees who work in the Boston public schools, even a one-day strike, would likely inflict financial harm on the City of Boston and the School Committee. (During a strike investigation, the Commission can make findings in the absence of direct evidence, *Boston School Committee*, 20 MLC 1244, 1248 (1993).)

Equal, if not more fundamental, is the non-economic, incalculable harm and chaos that would be caused by an illegal strike or work stoppage by 8000 public school teachers and other public school employees in 149 schools throughout the City of Boston. As a direct result of such an illegal job action, 58,000 school children would inappropriately be denied, at least on a temporary basis, their constitutionally guaranteed right to public education under the State Constitution. Part II, c. 5, Section 2; *McDuffy v. Secretary of the Executive Office of Educ.*, 415 Mass.

545, 621 (1993). We hold that such a deprivation constitutes an irreparable harm of the highest degree, and is exactly the type of harm which Chapter 150E and Section 9A are expressly intended to prevent.

Furthermore, the contemplated illegal strike or work stoppage has foreseeable, severe and irreparable ripple effects on the parents and guardians of students who would be unable to attend school during the work stoppage, as well as on the greater public at large. For example, as the result of a strike, parents of school age children would suddenly be forced to make alternate arrangements for child care. Under such short notice and crisis circumstances, which would exist across the entire city for all parents and guardians of school children, such emergency child care would be difficult, if not impossible, to obtain. As a result, working parents and guardians would in many instances be faced with the choice of leaving children at home unsupervised, or of not reporting to work as scheduled. Choosing to leave younger children unsupervised may subject families to legal sanction, and choosing not to report to work as scheduled, even though a reasonable, and logical choice under the circumstances, could likewise subject working parents to discipline or termination at work. In addition to this foreseeable personal adverse job action suffered by working parents and guardians, thousands, and potentially tens of thousands of people not showing up for work on the same day would unquestionably have a significant effect on the ability of the business community to serve public needs, as well as on the Massachusetts economy. We further note that the severity of these conditions and hardships for students, families, and the public

would significantly worsen the longer the duration of an illegal strike or work stoppage.

Finally, even absent an actual strike or work stoppage, further irreparable harm would occur as a result of the necessity of shifting and mobilizing public resources to deal with the threatened consequences of an illegal strike or work stoppage. First, prudent contingency planning required for public sector institutions and officials to deal with a strike is a difficult, complex process, in and of itself, that necessarily deflects attention away from the primary mission of the public institution, i.e., important educational matters. Likewise, such required contingency planning necessarily draws scarce public resources and dollars away from other critical public, and in this case, educational issues. The loss of attention to the primary mission of public institutions and loss of public resources that would otherwise have been devoted to the primary mission issues is permanent, and in that sense, irreparable as well.

We further note that suddenly having a significant number of school children on the streets of Boston would also pose a significant increased burden on police and public safety personnel, as studies show a correlation between neighborhood conflict, youth crime and gang violence during times when school is not in session. This potential result is yet another example of the ripple effects of an illegal strike or work stoppage upon the public that the Law is specifically designed to prevent.[5]

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[5] Fox J. A. (2003), *Time of day for youth violence (ages 10-17)*, 1999. Boston, MA: Northeastern University, adapted from 1999 NIBRS data.

Given the facts in evidence in this case, we find that: the Union's maintenance of By-law IX, Section 1(b); the Executive Board's December 20, 2006 act of voting to place a strike vote before the membership, and the Union's actions in calling a general membership meeting on January 10, 2007, where the Executive Board's motion was presented to the membership and the membership voted to place a strike vote on the agenda for the next membership meeting, and the referenced bulletin statements all support a finding that a strike, work stoppage, slowdown or withholding of services is about to occur and that the Union, its officers, and Executive Board members have induced, encouraged, and condoned such action in violation of Section 9A(a) of the Law.

Conclusion

Based on the parties' stipulations and the facts set forth above, we conclude that: the Union and its membership are about to engage in a strike in violation of Section 9A of the Law and that the Union, its officers, and its Executive Board are inducing, encouraging, and condoning such action in violation of Section 9A of the Law.

Order

Accordingly, pursuant to the authority vested in the Commission by Sections 9A(a) and (b) of the Law, we order that:

1. The Union, its officers, Executive Board members, and employees it represents shall not engage in or threaten to engage in, a strike or work stoppage of any type.

2. The Union, its officers, and Executive Board members shall immediately cease and desist from inducing, encouraging, or condoning any strike, work stoppage, or other withholding of services.

3. The Union, its officers, and Executive Board members shall immediately, but in no event any later than 1:00 p.m. on January 31, 2007, convene a meeting of the nineteen member Executive Board and take any necessary action to rescind the vote of December 20, 2006 that placed the following Motion before the Union's general membership:

> Motion: To place before the membership on February 14, 2007 for discussion, consideration, and debate by that body, in accordance with the bylaws, the question whether there should be a one-day strike on February 15, 2007 or on such other dates as may be chosen by the membership.

4. The Union, its officers, and Executive Board members shall publicly disavow the December 20, 2006 vote of the Executive Board that placed the Motion in paragraph 3, above, before the Union's general membership by announcing this disavowal to the media in the same manner and method that the Union uses to announce other issues of importance to its membership. Such disavowal shall be completed on or before 1:00 p.m. on January 31, 2007.[6]

5. The Union, its officers, and Executive Board members shall take any necessary steps to notify the employees whom it represents of: its public

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[6] *Boston Teachers Union*, 30 MLC 129, 131 (2004).

disavowal of the December 20, 2006 vote of the Executive Board that placed the Motion in paragraph 3, above, before the Union's general membership. Such notification shall be completed before 1:00 p.m. on January 31, 2007 and shall be accomplished using the Union s usual methods of communicating with the employees it represents, including but not limited to a) posting an emergency information bulletin on the Union's web site and b) broadcasting an electronic mail message to all those employees and other persons to whom the Union regularly and routinely sends electronic mail.

6. The Union, its officers, and Executive Board members shall take any necessary steps to notify the employees whom it represents of their obligation to fully perform the duties of their employment, including the obligation to not participate in any form of strike or work stoppage. Such notification shall be completed before 1:00 p.m. on January 31, 2007 and shall entail the methods of communication set forth in Paragraph 5(a)-(b) of this Order.

7. The Union, its officers, and Executive Board members shall take any necessary steps to inform the employees whom it represents of the provisions of Sections 9A(a) and (b) of the Law and the contents of this Order. Such notification shall be completed before 1:00 p.m. on January 31, 2007 and shall entail the methods of communication set forth in Paragraph 5(a)-(b) of this Order.

8. The Union shall expunge Article IX, Section 1(b) from its By-laws.

9. The Union and the School Committee shall immediately initiate or resume negotiations to

resolution or impasse over the issues that separate them, and utilize the procedures for resolving disputes provided in their collective bargaining agreements and M.G.L. 150E.

10. The Union and the School Committee shall appear at 1:00 p.m. on Wednesday, January 31, 2007 at the offices of the Labor Relations Commission, 399 Washington Street, 4th floor, Boston, MA for a proceeding to determine compliance with this Order.

11. The Commission shall retain jurisdiction of this matter to set further requirements as may be appropriate for compliance with this Order.

SO ORDERED.

* * * * * *

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

***

Commissioners participating:

John F. Jesensky, Chairman
Hugh L. Reilly, Commissioner
Paul T. O'Neill, Commissioner

Appearances:

Matthew Dwyer, Esq.-	Representing the Boston Teachers Union, Local 66, AFT Massachusetts, and its officers and Executive Board members
Elizabeth Valerio, Esq.- Robert M. Spiegel, Esq.	Representing the Boston School Committee

DECISION ON COMPLIANCE
9A PROCEEDINGS

On January 9, 2007, the Boston School Committee (School Committee) filed a petition with the Labor Relations Commission (Commission) for a strike investigation (Petition) pursuant to Section 9A(b) of Massachusetts General Laws, Chapter 150E (the Law). The Petition alleges that the Boston Teachers Union, Local 66, AFT Massachusetts (Union) is about to engage in a strike, and that the Union, its officers, and its Executive Board members have induced, encouraged, and condoned a strike, work stoppage, or withholding of services in violation of Section 9A of the Law. The Commission investigated the Petition on January 11, 2007.

On January 18, 2007, the Commission issued a Final Order (Order) finding that the Union and its membership are about to engage in a strike in violation of Section 9A of the Law, and that the Union, its officers, and its Executive Board members are inducing, encouraging, and condoning that action. The Commission set the following requirements for the Union and the School Committee to ensure compliance with the Law:

1. The Union, its officers, and Executive Board members and employees it represents shall not engage in or threaten to engage in, a strike or work stoppage of any type.

2. The Union, its officers, and Executive Board members shall immediately cease and desist from inducing, encouraging, or condoning any strike, work stoppage, or other withholding of services.

3. The Union, its officers, and Executive Board members shall immediately, but in no event any later than 1:00 p.m. on January 31, 2007, convene a meeting of the nineteen member Executive Board and take any necessary action to rescind the vote of December 20, 2006 that placed the following Motion before the Union's general membership:

> Motion: To place before the membership on February 14, 2007 for discussion, consideration, and debate

by that body, in accordance with the bylaws, the question whether there should be a one-day strike on February 15, 2007 or on such other dates as may be chosen by the membership.

4. The Union, its officers, and Executive Board members shall publicly disavow the December 20, 2006 vote of the Executive Board that placed the Motion in paragraph 3, above, before the Union's general membership by announcing this disavowal to the media in the same manner and method that the Union uses to announce other issues of importance to its membership. Such disavowal shall be completed on or before 1:00 p.m. on January 31, 2007.

5. The Union, its officers, and Executive Board members shall take any necessary steps to notify the employees whom it represents of: its public disavowal of the December 20, 2006 vote of the Executive Board that placed the Motion in paragraph 3, above, before the Union's general membership. Such notification shall be completed before 1:00 p.m. on January 31, 2007 and shall be accomplished using the Union's usual methods of communicating with the employees it represents, including but not limited to: a) posting an emergency information bulletin on the Union's web site; and b)

broadcasting an electronic mail message to all those employees and other persons to whom the Union regularly and routinely sends electronic mail.

6. The Union, its officers, and Executive Board members shall take any necessary steps to notify the employees whom it represents of their obligation to fully perform the duties of their employment, including the obligation to not participate in any form of strike or work stoppage. Such notification shall be completed before 1:00 p.m. on January 31, 2007 and shall entail the methods of communication set forth in Paragraph 5(a)-(b) of this Order.

7. The Union, its officers, and Executive Board members shall take any necessary steps to inform the employees whom it represents of the provisions of Sections 9A(a) and (b) of the Law and the contents of this Order. Such notification shall be completed before 1:00 p.m. on January 31, 2007 and shall entail the methods of communication set forth in Paragraph 5(a)-(b) of this Order.

8. The Union shall expunge Article IX, Section 1(b) from its By-laws.

9. The Union and the School Committee shall immediately initiate or resume negotiations to resolution or impasse

over the issues that separate them, and utilize the procedures for resolving disputes provided in their collective bargaining agreements and M.G.L. 150E.

10. The Union and the School Committee shall appear at 1:00 p.m. on Wednesday, January 31, 2007 at the offices of the Labor Relations Commission, 399 Washington Street, 4th floor, Boston, MA for a proceeding to determine compliance with this Order.

The Order set a compliance deadline of January 31, 2007 at 1:00 p.m. and required the parties to attend a Commission proceeding at that time to present evidence regarding compliance. Neither party subsequently requested reconsideration or clarification of the Order.

On January 31, 2007, Susan Atwater, a duly-designated Commission agent, conducted proceedings to determine whether or not the Union and the School Committee complied with the Order. Both parties had an opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to file briefs. The School Committee filed a brief on February 1, 2007. The Union notified the Commission on February 1, 2007 that it had elected not to file a brief.

Stipulations of Fact

1. The Boston School Committee and the Boston Teachers Union have had three negotiation

sessions since the Commission's January 18, 2007 Order: Thursday, January 18, [2007], 8:30 a.m. - 12:00 p.m., Friday, January 26, [2007], 2:00 p.m. - 6:00 p.m., and Monday, January 29, [2007] 8:30 a.m. to 5:30 p.m.

2. The Boston School Committee and the Boston Teachers Union currently have seven more negotiations scheduled: Wednesday, January 31, [2007], 10:00 a.m. - 4:00 p.m., Friday, February 2, [2007], 2:00 p.m. - 6:00 p.m., Saturday, February 3, [2007], 9:00 a.m. - 1:00 p.m., Wednesday, February 7, [2007], 9:00 a.m. to ____ (sic), Monday, February 12, [2007], 9:00 a.m. - (undetermined ending point), Wednesday, February 14, [2007], 9:00 a.m. - 12:00 p.m., and Thursday, February 15, [2007], 8:30 a.m. - 4:00 p.m.

Findings of Fact

Between the date of the Order and the date of the compliance proceeding, the Union issued E-Bulletins on the following dates: January 19, 2007, January 24, 2007, January 26, 2007 and January 30, 2007. These four E-Bulletins address a variety of topics including the current collective bargaining negotiations between the Union and the School Committee. None of the E-Bulletins references the Executive Board's December 20, 2006 vote to take a motion to the membership to take a strike vote on February 14, 2007, and none of the E-Bulletins states that the Union disavows this vote. These E-Bulletins do not inform employees of the contents of the Order, of Sections 9(A)(a) and (b) of the Law, and of their obligation to fully perform the duties of their employment and to refrain from participating in any

form of strike or work stoppage. There is no reference in any of the four E-Bulletins to Article IX of the Union's By-laws and no reference to any action by the Executive Board to expunge Article IX from the By-laws.

The E-Bulletins dated January 19, 2007 and January 24, 2007 refer to the Commission's January 18, 2007 Order. The January 19, 2007 E-Bulletin states in pertinent part:

> Last night, the State Labor Relations Commission issued an order to both the BTU and the Boston School Committee. Union attorneys are currently studying the order. We will comment at an appropriate time.

The E-Bulletin dated January 24, 2007 states:

> As we went to press last week, we had just received notice that the State Labor Relations Commission had issued an interim ruling on the matter of our February 14th vote. We will offer no comment on the ruling until our attorneys have had ample opportunity to study it. You may want to read a Globe Editorial on the matter." (Emphasis in original.)[1]

The Union published a newspaper, The Boston Union Teacher, after the Commission had issued its

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[1] The January 24 E-Bulletin contained a link to an editorial column in The Boston Globe newspaper.

Order.[2] The newspaper reports that the Union held a membership meeting in January of 2007. According to the newspaper, Executive Board member James Philip (Philip) made a motion at that meeting to place before the membership on February 14, 2007 the question whether there should be a one-day strike as early as February 15, 2007 and spoke in support of that motion. The newspaper quoted Philip as stating that "waiting any longer is not an option." The newspaper further reports that the 700 members in attendance at the meeting unanimously voted to approve the motion. The newspaper also indicates that no one spoke in opposition to the motion, and that members left the meeting with a "steely willingness to strike if the School Committee forces [their] hand." The newspaper quotes a Union member, David Weinstein (Weinstein), as stating, "[i]t's unfortunate that it comes to this, but it's good to know that the BTU can take care of business." The newspaper does not disavow the Executive Board's December 20, 2006 vote, notify the employee-members of their obligation to refrain from participating in a strike or work stoppage, or inform them of the provisions of Section 9(A)(a) and (b) of the Law and the contents of the Order. On the contrary, the front page headline contains a statement to the effect that the membership unanimously approved preparing for a strike vote.

The Union and the School Committee held three negotiation sessions between the date of the Commission's Order and the date of the compliance proceeding. The parties have also scheduled

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[2] The Commission, after allowing the parties to comment, accepted the February, 2007 edition of The Boston Union Teacher into evidence.

negotiation sessions on six dates in February of 2007.

The Union offered no evidence to show that it has complied with the requirements of paragraphs 1 through 8, inclusive, of the Order. Specifically, Union Counsel declined two opportunities to present testimony or argument at the compliance proceeding. Union Counsel further indicated that he had no evidence or argument to offer to establish that:

1) The Union, its officers, Executive Board members, and employees it represents are not engaging in or threatening to engage in, a strike or work stoppage of any type (Paragraph 1);

2) The Union, its officers, and Executive Board members have ceased and desisted from inducing, encouraging or condoning any strike, work stoppage, or other withholding of services (Paragraph 2);

3) The Union, its officers and Executive Board members have convened a meeting of the Executive Board and taken action to rescind the vote of December 20, 2006 to place a motion before the Union's general membership to take a strike vote (Paragraph 3);

4) The Union, its officers, and Executive Board members have publicly disavowed the December 20, 2006 vote of the Executive Board that placed the strike vote motion before the Union's general membership by

announcing the disavowal to the media by the same manner and method that the Union uses to announce other issues of importance to the membership (Paragraph 4);

5) The Union, its officers, and Executive Board members have taken all necessary steps to notify the employees it represents of its public disavowal of the December 20, 2006 vote of the Executive Board that placed the strike vote motion before the Union's general membership, using the Union's usual methods of communicating with the employees it represents, including but not limited to: (a) posting an emergency information bulletin on the Union's web site, and (b) broadcasting an electronic message to all those employees and other persons to whom the Union regularly and routinely sends electronic mail (Paragraph 5);

6) The Union, its officers, and Executive Board members have taken all necessary steps to notify the employees it represents of their obligation to fully perform the duties of their employment, including the obligation not to participate in any form of strike or work stoppage (Paragraph 6);

7) The Union, its officers, and Executive Board members have taken all necessary steps to inform the employees that the Union represents of the provisions of Sections 9A(a) and (b) of the Law and of the contents of the Commission's Order (Paragraph 7);

8) The Union has expunged Article IX, Section 1(b) from its By-laws (Paragraph 8).

Discussion

The Commission holds compliance proceedings to determine whether parties obligated to perform or refrain from activities described in a Commission order have done so. Parties required to comply with a Commission order have the burden of proving their compliance by a preponderance of the evidence, see Commission Rule 16.08(6), 456 CMR 16.08(6), and must demonstrate their compliance with the order within any deadline set by the Commission.

Where a party has relevant evidence within its control that it fails to produce, that failure gives rise to an inference that the evidence is unfavorable to the party. Bellingham Teachers Association, 9 MLC 1536, 1548 (1982), citing Auto Workers v. NLRB, 459 F.2nd 1329, 79 LRRM 2332, 2336 (D.C. Cir. 1972). When a party does not present evidence that meets the preponderance of the evidence standard, the Commission can infer noncompliance and initiate enforcement proceedings. If a party presents no evidence at all to show that the required conduct has been completed or the proscribed conduct remedied, the Commission can only conclude that the required conduct has not been undertaken or completed, and that the proscribed conduct is continuing.

The evidence adduced at the compliance proceeding establishes that the Union has refused and continues to refuse to comply with the requirements in the Commission's Order for which enforcement is

sought.[3] The evidence further demonstrates that the Union is inducing, encouraging and condoning violations of 9(A) and the Order. First, the Commission draws an adverse inference from the Union's failure to present evidence to demonstrate its compliance with the requirements of paragraphs 1 through 8 of the Order. Bellingham Teachers Association, supra. The Union gave no reason for its non-compliance with those requirements[4] and presented no evidence that it had made any effort to comply. Second, the evidence demonstrates that the Union continues to communicate with its members regarding the negotiations and the fact that the Commission issued the Order, yet purposely omits any reference to the specific requirements of the Order. Rather than informing employees of the strike prohibitions of Section 9(A)(a) and (b) of the Law and advising them to work within the Law's parameters, the Union is encouraging defiance of the Order by linking employees to an editorial critique of the Commission's decision, and by highlighting the unanimous membership vote to conduct a strike vote on the front page of a newspaper distributed to every

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[3] The stipulations of fact demonstrate that the Union and the School Committee have complied with their mutual obligation to continue negotiations, but there is no evidence that they have utilized the procedures for resolving disputes provided in their collective bargaining agreement and the Law or exhausted the procedures provided in the Law to resolve their dispute. Additionally, the parties' attorneys appeared before the Commission at the compliance proceeding on January 31, 2007.

[4] The Union raised constitutional arguments in its motion to dismiss the strike petition. However, it did not present argument or evidence in the compliance proceeding that the Commission's Order would be or is unconstitutional, facially or as applied.

member. Finally, the Union provided additional information about the imminent February 14, 2007 strike vote without advising the membership of the illegality of the strike and in contravention of the Commission's order to disavow the Executive Board and membership votes.

Conclusion

For the foregoing reasons, we conclude that the Union, its Executive Board and officers have failed to comply with paragraphs 1 through 8, inclusive, of the Commission's January 18, 2007 Order, see, supra, pages 2-3, and are in continuing violation of the Law. Further, the Commission, pursuant to 456 CMR 16.03(3) and 16.08(8), orders the School Committee to serve a copy of this Decision on Compliance upon the Union and each of the Union's Executive Board members and officers listed in the caption of the Petition.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

/s/ JOHN F. JESENSKY, CHAIRMAN
JOHN F. JESENSKY, CHAIRMAN

/s/ HUGH L. REILLY, COMMISSIONER
HUGH L. REILLY, COMMISSIONER

/s/ PAUL T. O'NEILL, COMMISSIONER
PAUL T. O'NEILL, COMMISSIONER

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. Superior Court Department
of the Trial Court
Civil Action No. 07-0587F

LABOR RELATIONS COMMISSION,)
Plaintiff,)
)
v.)
)
BOSTON TEACHERS UNION,)
LOCAL 66, AFT -)
MASSACHUSETTS, RICHARD)
STUTMAN, in his capacity as)
President, PATRICK CONNOLLY, in)
his capacity as Executive Vice)
President, EDWARD A. WELCH, in)
his capacity as Secretary-Treasurer,)
MICHAEL MCLAUGHLIN, in his)
capacity as Elementary Field)
Representative and Executive Board)
Member, CAREN CAREW, in her)
capacity as Secondary Field)
Representative and Executive Board)
member, JENNA FITZGERALD in)
her capacity as Paraprofessional/)
Substitute Field Representative and)
Executive Board member, PATRICIA)
ARMSTRONG, in her capacity as)
Political Organizer and Executive)
Board member, ROB CARROLL,)
ISILDA COLONETTE, ANGELA)
CHRISTIANI, ALLISON DOHERTY-)

LACASSE, DEE ESPOSITO, MARY F. GLYNN, ROBERT F. JANGO, CHARLIE JOHNSON, CHERYL L. KELLY, MICHAEL MAGUIRE, JAMES PHILIP, and MARY ANN URBAN, in their capacities as Executive Board members
Defendants.

PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER

The Plaintiff, Labor Relations Commission (Commission), moves for a temporary restraining order pursuant to Mass. R. Civ. P. 65(a) on the grounds that the Defendants are refusing to comply with the Final Order (Order) issued by the Commission on . . .

1. ALLOWED. See Memorandum of Decision and order of this date. /s/ 2/13/07

2. As all parties were heard before the issuance of my order of 2/13/07 granting the request for a TRO, that TRO will become a preliminary injunction upon its expiration. If the defendants wish some further argument, they must submit a request for a hearing in writing before 1:00 p.m. on February 21, 2007. That request must set forth why a further hearing is warranted. /s/ 2/15/07

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. Superior Court
Civil Action No. 07-587-F

LABOR RELATIONS COMMISSION

vs.

THE BOSTON TEACHERS UNION, et al.

MEMORANDUM OF DECISION AND ORDER ON THE PLAINTIFF'S REQUEST FOR A TEMPORARY RESTRAINING ORDER

Before the Court is the request of the Plaintiff, Labor Relations Commission (LRC), for injunctive relief requiring the defendants to comply with the provisions of a final order issued by it on January 18, 2007. After a hearing at which counsel for both sides were present and argued, the requested injunctive relief is ALLOWED. Given the exigencies of the present situation, this memorandum of decision will not be a lengthy explication of the issues or of the applicable law.

As an initial matter, I find that I do have jurisdiction over this matter, pursuant to the provisions of G.L. c. 150E, §9A.

The LRC has met the requirements for the issuance of the injunctive relief requested. First, I find that the LRC has a substantial likelihood of success on the merits of this matter. Strikes by public employees are clearly illegal under G.L.

c. 150E, §9A. Director of the Div. of Employee Relations of the Dept. of Admin. & Fin. v. Labor Relations Comm'n, 370 Mass. 162, 167-168 (1976). I find that the LRC has established that a strike, although not yet voted upon by the Union's members, is about to occur, in violation of G.L. c. 150E, §9A and I find that the procedural provisions that section have been complied with by the LRC.

In weighing the harms to the parties by the granting or denial of the requested injunctive relief, I find that the balance tips heavily in favor of the LRC. A strike, even for one day, has serious and irreparable consequences for the City of Boston and for its students and those who care for them. There is a strong public policy disfavoring strikes by public employees, Boston Housing Authority v. Labor Relations Commission, 398 Mass. 715, 720 (1986), as those employees provide essential services and serve the public welfare.

As the LRC has met its burden, I hereby order the defendants to comply with the following provisions of the LRC's Order of January 18, 2007, in Case No. SI-07-272 as follows:

1. The Boston Teachers Union (the Union), its executive board members, and the employees it represents shall not engage in or threaten to engage in a strike or work stoppage of any type.

2. The Union, its officers, and its executive board members shall immediately cease and desist from inducing, encouraging, or condoning any

strike, work stoppage, or other withholding of services.

3. The Union, its officers, and its executive board members shall publicly disavow the December 20, 2006, vote of the executive board that placed before the Union's general membership the motion calling for the "discussion, consideration, and debate by that body, in accordance with the bylaws, the question whether there should be a one-day strike on February 15, 2007 or on such other dates as may be chosen by the membership." That public disavowal shall be announced to the media in the same manner and method that the Union uses to announce other issues of importance to its membership. The disavowal shall be completed before 11:00 A.M. on February 14, 2007.

4. The Union, its officers, and its executive board members shall take any steps necessary to notify the employees whom it represents of its public disavowal of the December 20, 2006 vote of the executive board that placed the motion noted in paragraph 3, above, before the Union's general membership. Such notification shall be completed before 11:00 A.M. on February 14, 2007, and shall be accomplished using the Union's usual methods of communicating with the employees it represents, including but not limited to: a) posting an emergency information bulletin on the Union's web site; b) broadcasting an electronic message to all those employees and other persons to whom the Union regularly and routinely sends

electronic mail; and c) announcing it at the general membership meeting scheduled for February 14, 2007.

5. The Union, its officers, and its executive board members shall take any necessary steps to notify the employees whom it represents of their obligation to fully perform the duties of their employment, including the obligation not to participate in any form of strike or work stoppage. Such notification shall be completed before 11:00 A.M. on February 14, 2007, and shall utilize the methods of communication set forth in paragraph 4, above.

6. The Union, its officers, and its executive board members shall take any steps necessary to inform the employees it represents of the provisions of G.L. c. 150E, §§9A(a) and (b) and of the contents of the LRC's Order. Such notification shall be completed before 11:00 A.M. on February 14, 2007, and shall utilize the methods of communication set forth in paragraph 4, above.

I decline to order the other relief requested by the LRC at this time.

SO ORDERED

Dated: February 13, 2007

/s/ Bruce R. Henry
Bruce R. Henry
Associate Justice

APPENDIX E

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. Superior Court
Civil Action No. 07-587-F

LABOR RELATIONS COMMISSION

vs.

THE BOSTON TEACHERS UNION, et al.

MEMORANDUM OF DECISION AND ORDER ON THE PLAINTIFF'S CONTEMPT COMPLAINT

Before the Court is the complaint of the Plaintiff, Labor Relations Commission (LRC), for contempt of orders of this Court requiring the defendants to comply with the provisions of a final order issued by it on January 18, 2007. After an evidentiary hearing at which both sides had the opportunity to present evidence, and for the reasons which follow, I find that the Boston Teachers Union, Local 66, AFT, AFL-CIO (BTU) is in contempt of my orders issued on February 13, 2007.

Preliminary Matters

The defendants challenge the sufficiency of the contempt complaint and of the notice to the defendants of that complaint. I find that the complaint fairly and adequately sets out the alleged contempt of the defendants and informs the defendants of the charges against them.

Not all of the individual defendants were served in hand with the contempt complaint. Given my findings below, it does not matter that some of the individually named defendants were not served in hand with the contempt complaint.

Preliminary Injunction

After a hearing at which the parties had a full opportunity to be heard, I issued a temporary restraining order, which has since been converted to a preliminary injunction. The injunction read as follows:

> **I hereby order the defendants to comply with the following provisions of the LRC's Order of January 18, 2007, in Case No. SI-07-272 as follows:**
>
> 1. **The Boston Teachers Union (the Union), its executive board members, and the employees it represents shall not engage in or threaten to engage in a strike or work stoppage of any type.**
>
> 2. **The Union, its officers, and its executive board members shall immediately cease and desist from inducing, encouraging, or condoning any strike, work stoppage, or other withholding of services.**
>
> 3. **The Union, its officers, and its executive board members shall publicly disavow the December 20,**

2006, vote of the executive board that placed before the Union's general membership the motion calling for the "discussion, consideration, and debate by that body, in accordance with the bylaws, the question whether there should be a one-day strike on February 15, 2007 or on such other dates as may be chosen by the membership." That public disavowal shall be announced to the media in the same manner and method that the Union uses to announce other issues of importance to its membership. The disavowal shall be completed before 11:00 A.M. on February 14, 2007.

4. **The Union, its officers, and its executive board members shall take any steps necessary to notify the employees whom it represents of its public disavowal of the December 20, 2006 vote of the executive board that placed the motion noted in paragraph 3, above, before the Union's general membership. Such notification shall be completed before 11:00 A.M. on February 14, 2007, and shall be accomplished using the Union's usual methods of communicating with the employees it represents, including but not limited to: a) posting an emergency information bulletin on the Union's web site; b) broadcasting an electronic message to all those employees and other**

persons to whom the Union regularly and routinely sends electronic mail; and c) announcing it at the general membership meeting scheduled for February 14, 2007.

5. **The Union, its officers, and its executive board members shall take any necessary steps to notify the employees whom it represents of their obligation to fully perform the duties of their employment, including the obligation not to participate in any form of strike or work stoppage. Such notification shall be completed before 11:00 A.M. on February 14, 2007, and shall utilize the methods of communication set forth in paragraph 4, above.**

6. **The Union, its officers, and its executive board members shall take any steps necessary to inform the employees it represents of the provisions of G.L. c. 150E, §§9A(a) and (b) and of the contents of the LRC's Order. Such notification shall be completed before 11:00 A.M. on February 14, 2007, and shall utilize the methods of communication set forth in paragraph 4, above.**

I decline to order the other relief requested by the LRC at this time.

SO ORDERED

Contempt Complaint and Hearing

In its complaint, the LRC charges that the defendants have failed to comply with the orders in Paragraphs 2-6 of the TRO/Preliminary Injunction. In support of its complaint, the LRC presented the testimony of three employees of the Boston Public Schools and placed in evidence several documents. The defendants called no witnesses, but did offer several additional documents into evidence.

Findings of Fact

The temporary restraining order was issued late in the day on February 13, 2007. Counsel for the defendants received notice of it on that late afternoon/early evening.

The next day, February 14, 2007, the defendants sought from this Court a stay of the order. That was denied after a hearing. A single justice of the Appeals Court also denied a stay of the order on the afternoon of February 14, 2007.

The defendants did not comply with the provisions of the temporary restraining order by the deadline of 11:00 A.M. on February 14, 2007.

Prior to the general membership meeting scheduled for 4:00 P.M. on February 14, 2007, the Executive Board of the BTU met at approximately 3:00 P.M. in emergency session. After hearing an update from the negotiating team, which was present at that meeting, the Executive Board recommended that the membership defer any debate

on the 12/20/06 motion of the Executive Board[1] for two weeks. (Ex. 5 and 6).

The membership passed the following motion at the general membership meeting on February 14, 2007: "To recess today's meeting to 2/28/07 and to defer, in light of recent developments, any discussion, consideration and debate on the Executive Board's December 20, 2006 motion to that meeting." (Ex. 5 and 6).

At the end of BTU e-Bulletin #32 (Ex. 6), sent out on February 16, 2007, the BTU provided a "Legal Update", purportedly sent in accordance with this Court's order of February 16, 2007. The members were urged to read the Legal Update carefully. The Legal Update provided a brief summary of the proceedings before the LRC and this Court. It also informed the membership of the provisions of G.L. c. 150E, § 9(a) and (b), and provided a definition of the word "strike". Parenthetically, the Legal Update indicated that: "(The above law prohibits public employees from refusing to fully perform the duties of their employment)." Finally, that Legal Update provided links to the Compliance Decision of the LRC, to this Court's Order of February 13, 2007, and to the Memorandum and Order issued by the single justice of the Appeals Court. (Ex. 6).

A BTU e-Bulletin #33, dated February 21, 2007, reminded members of the meeting scheduled

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[1] That motion was: "To place before the membership on February 14, 2007 for discussion, consideration and debate by that body, in accordance with the by-laws, the question whether there should be a one-day strike on February 15, 2007 or on such other dates as may be chosen by the membership."

for February 28, 2007. That meeting, according to the e-Bulletin, "is a continuation of the February 14 meeting that was recessed by virtue of passage of the following motion:

Motion: 'To recess today's (2/14/07) meeting to 2/28/07 and to defer, in light of recent developments, any discussion, consideration and debate on the Executive Board's December 20, 2006 motion to that meeting.'" There was no further attempt in e-Bulletin #33 to take any of the steps required by my order of February 13, 2007. (Ex. 7).

I find that the BTU has not taken steps to publicly disavow the December 20, 2006, vote of the executive board that placed before the Union's general membership for a vote on February 14, 2007, the issue of whether there should be a one-day strike on February 15, 2007. There was no disavowal by the BTU, only a deferral of the issue to the general membership meeting scheduled for February 28, 2007.

In the weeks between the Executive Board's vote on December 20, 2006, and the February 14, 2007, general membership meeting of the BTU, negotiations continued, unsuccessfully, and the Boston Public Schools prepared for the possibility of a strike on February 15, 2007. I find that those preparations were necessary and reasonable in order to protect the safety of the 58,000 students who would potentially be affected by a strike. Such preparations included, but were not limited to, preparation of various mailings to parents, teachers, and staff; meetings with principals; meetings of the Strike Contingency Planning Group; preparation and distribution of flyers and notices; coordination

with the Boston Police Department, with the transportation providers, and with community centers and libraries; set-up of an operations control facility; and other items. I find credible the testimony of the Boston Public School officials, Joseph Shea, James McIntyre, and Joseph McDonough, regarding the steps taken by the Boston Public Schools to prepare for a possible strike and regarding the expenses incurred in that preparation. I find that the Boston Public Schools expended nearly $30,000.00 in preparing for the possible strike on February 15, 2007, and will continue to incur additional expenses given the deferral of the vote on the December 20, 2006 motion regarding a possible strike. In addition, the Boston Public Schools incurred legal fees of over $34,000.00 in seeking to avert the potential strike. I also find that the vast majority of those expenses were incurred before my order of February 13, 2007, was issued.

The BTU collected over $5,000,000.00 in dues for the 2005-2006 school year and has received over $2,700,000.00 in dues and service fees from September, 2006 to the present. There was no testimony from any of the parties as to what portion of the dues and service fees collected were retained by Local 66 and what portion was paid to state or national entities with which the BTU is affiliated. There was, however, an indication in Exhibit 3 that for the 2005-2006 school year, the BTU had receipts of $5,634,431.00 and disbursements of $5,395,683.00.

Applicable Law

Contempt consists in failing to do something which the contemnor is ordered by the Court to do.

O'Connell v. Greenwood, 59 Mass.App.Ct. 147, 149 (2003). The Court must first determine whether the order at issue provided the alleged contemnor with a clear and unequivocal, command to do some action or to refrain from some conduct. See id., at 150. The complainant must then show that the order was undoubtedly disobeyed. The burden of proof in a contempt action is on the complainant to prove its case by a preponderance of the evidence. Judge Rotenberg Educ. Ctr., Inc. v. Commissioner of Dep't of Mental Retardation (No. 1), 424 Mass. 430, 443 (1997).

As a general rule, "judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained." Gianetti v. Thomas, 32 Mass.App.Ct. 960 (1992) quoting United States v. United Mine Workers, 330 U.S. 258, 303-304 (1947). "In determining the amount of a fine imposed as a means of securing future compliance, a judge should consider the character and magnitude of the threatened harm, the probable effectiveness of any suggested sanction, the defendant's financial resources, and the seriousness of the burden on that defendant." Labor Relations Commission v. Fall River Educators' Association, 382 Mass. 465, 482 (1981). A coercive fine may not be punitive. Id.

Discussion

The LRC has met its burden of proof on one aspect of its complaint for contempt in this matter. I find that the BTU has not complied with the orders in Paragraphs 3 and 4 of the order of February 13,

2007. The BTU has not publicly disavowed the December 20, 2006 vote of its executive board which placed before the Union's general membership the motion calling for the "discussion, consideration, and debate ... [of] the question whether there should be a one-day strike on February 15, 2007 or on such other dates as may be chosen by the membership." The order to do so was clear and unequivocal. The Union's executive board met before the general membership meeting on February 14, 2007, and recommended that consideration of the December 20, 2006 motion be deferred for two weeks. Ultimately, that motion for deferral was presented to and passed by the general membership of the BTU. There was no disavowal of that earlier motion as was ordered in ¶3 of my order. The failure to publicly disavow the earlier motion was a clear and unequivocal violation of my order. Since the BTU did not publicly disavow that earlier motion, it also did not notify its members of that public disavowal. That failure is a clear and unequivocal violation of ¶4 of my order, which clearly required the Union to notify the members of its public disavowal. Since the LRC has not established what officers or members of the executive board participated in the decisions which violated my order of February 13, 2007, I decline to sanction any of the individual members at this time.

The LRC has not proven that the defendants are in violation of any of the other provisions of my order.

The LRC seeks a sanction of $100,000.00 per day, increasing each day by $25,000.00, for each day of continuing contempt by the BTU, its officers, and its executive board. Such an amount is not warranted and appears more punitive than coercive.

In considering the character and magnitude of the threatened harm, I am mindful that the uncertainty of whether the teachers will vote to strike requires the Boston Public School to continue to plan for the contingency of a strike and to expend funds for that planning. With over $60,000 of expenses already incurred, the ongoing possibility of a strike will create the need for expenditures of additional time and money by the Boston Public Schools. While not mammoth, those expenditures are substantial and warrant the imposition of a substantial coercive measure.

Whether the BTU will be coerced by whatever sanction I order is speculative; however, I note that in response to my earlier order there was some effort, albeit incomplete, made at compliance. The amount, therefore, should be sufficient to make compliance the choice of the BTU. I also consider the financial resources of the BTU and the burden any such sanction will place upon it. The BTU chose not to provide any information concerning its assets or its liabilities. The LRC provided evidence which reflects that while the BTU receives a large amount of money from its collection of dues and service fees, it also has disbursements which are extensive.

ORDER

For the foregoing reasons and given the information at hand, I find that a coercive fine in the amount of $30,000 per day is warranted. If the BTU, its officers, and its executive board comply with the provisions of Paragraphs 3 and 4 of my order of February 13, 2007, by 2:00 P.M. today, February 27, 2007, no fine will be imposed. If they do not comply with the provisions of those paragraphs, the

$30,000.00 fine will be assessed as of that time. For each successive day on which the BTU, its officers, and its executive board do not comply with the order by 2:00 P.M. the fine will be increased by $10,000.00. For example, if there is no compliance by 2:00 P.M. on February 28, 2007, the fine for that day will be $40,000.00, bringing the total sanction to $70,000.00 as of that date and time. The fines will be paid to the Commonwealth of Massachusetts at this time. On a written motion, supported by appropriate affidavits, the Court will entertain a request to award some portion of the sanctions to the Boston Public Schools to compensate for losses incurred as a result of ongoing violations of the injunction.

SO ORDERED

Dated: February 26, 2007

/s/ Bruce R. Henry
Bruce R. Henry
Associate Justice

APPENDIX F

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. Superior Court Department
of the Trial Court
Civil Action No. 07-0587F

LABOR RELATIONS COMMISSION,)
Plaintiff,)
)
v.)
)
BOSTON TEACHERS UNION,)
LOCAL 66, AFT -)
MASSACHUSETTS, RICHARD)
STUTMAN, in his capacity as)
President, PATRICK CONNOLLY, in)
his capacity as Executive Vice)
President, EDWARD A. WELCH, in)
his capacity as Secretary-Treasurer,)
MICHAEL MCLAUGHLIN, in his)
capacity as Elementary Field)
Representative and Executive Board)
Member, CAREN CAREW, in her)
capacity as Secondary Field)
Representative and Executive Board)
member, JENNA FITZGERALD in)
her capacity as Paraprofessional/)
Substitute Field Representative and)
Executive Board member, PATRICIA)
ARMSTRONG, in her capacity as)
Political Organizer and Executive)
Board member, ROB CARROLL,)
ISILDA COLONETTE, ANGELA)
CHRISTIANI, ALLISON DOHERTY-)

LACASSE, DEE ESPOSITO, MARY F. GLYNN, ROBERT F. JANGO, CHARLIE JOHNSON, CHERYL L. KELLY, MICHAEL MAGUIRE, JAMES PHILIP, and MARY ANN URBAN, in their capacities as Executive Board members
Defendants.

Plaintiff/Defendant-in-Counterclaim, Labor Relations Commission's Motion to Dismiss

The Plaintiff/Defendant-in-Counterclaim, Labor Relations Commission (Commission), moves to dismiss the Counterclaim filed by the Defendants/ Plaintiffs-in-Counterclaim pursuant to: 1) Mass. R. Civ. P. 12(b)(5) on the grounds that the Defendants/Plaintiffs-in-Counterclaim improperly served a summons and the . . .

6/29/07 – After hearing and review of all submissions, the plaintiff/defendant in counterclaim's motion to dismiss pursuant to Mass. R. Civ. P. 12(b)(6) is Allowed due to the failure of the defendants plaintiff in counterclaim's failure to exhaust their administrative remedies. See: Labor Relations Committee vs Chelsea Teachers Union, 400 Mass. 120 (1987).

/s/ Thomas E. Connolly

APPENDIX F

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. Superior Court
Civil Action No. 07-587-F

LABOR RELATIONS COMMISSION

vs.

THE BOSTON TEACHERS UNION, et al.[1]

MEMORANDUM OF DECISION AND ORDER ON THE MOTION TO DISMISS DEFENDANTS' COUNTERCLAIM

Introduction

The Labor Relations Commission (the "Commission") filed this action to enforce its Final

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[1] AFT- MASSACHUSETTS, RICHARD STUTMAN, in his capacity as President, PATRICK CONNOLLY, in his capacity as Executive Vice President, EDWARD A. WELCH, in his capacity as Secretary-Treasurer, MICHAEL MCLAUGHLIN, in his capacity as Elementary field Representative and Executive Board Member, CAREN CAREW, in her capacity as Secondary Field Representative and Executive Board Member, JENNA FITZGERALD, in her capacity as Paraprofessional/Substitute Field Representative and Executive Board Member, PATRICIA ARMSTRONG, in her capacity as Political Organizer and Executive Board member, ROB CARROLL, ISILDA COLONETTE, ANGELA CHRISTIANI, ALLISON DOHERTY-LACASSE, DEE ESPOSITO, MARY F. GLYNN, ROBERT F. JANGO, CHARLIE JOHNSON, CHERYL L. KELLY, MICHAEL MAGUIRE, JAMES PHILIP, and MARY ANN URBAN, in their capacities as Executive Board members.

Order in a strike investigation against the Boston Teachers Union and all named defendants (the "Union"). Defendants filed a "counterclaim" against the individual Commissioners, John F. Jesensky, Hugh L. Reilly, and Paul T. O'Neill (the "Commissioners") alleging that they violated the Union's civil rights under 42 U.S.C. § 1983 by unlawfully interfering with their First Amendment protections of free speech and association.[2] The Commissioners filed this motion to dismiss a counterclaim against them pursuant to Rule 12(b)(6) of Massachusetts Rules of Civil Procedure on the grounds of immunity and failure by the Union to exhaust administrative remedies. For the reasons discussed below, the Commissioners' motion to dismiss the counterclaim is **ALLOWED**.

BACKGROUND

In January of 2007, the School Committee of the City of Boston and the Union were engaged in negotiations but could not reach an agreement on a contract. On January 6, 2007, the Union announced a vote of the executive board which would present a motion to the membership on whether to hold a one-day strike. A membership meeting to discuss and vote on the issue was scheduled for February 14, 2007 with a possible strike to occur on February 15, 2007. The Boston School Committee petitioned the Commission for a strike investigation pursuant to G.L. c. 150E, § 9A. The Commission investigated and on January 18, 2007 issued its Final Order

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[2] The defendants' counterclaim is brought against the Commissioners in their individual capacities. The individual Commissioners, however, are not parties to the Commission's complaint.

concluding that the Union had violated G.L. c. 150E, § 9A(a). The Final Order directed the Union, among other things, not to "engage in or threaten to engage in a strike or work stoppage of any kind," and to "cease and desist from inducing, encouraging or condoning any strike, work stoppage or other withholding of services." At a compliance hearing, the Commission found that the Union had not complied with the order. Subsequently on February 8, 2007, the Commission filed this complaint for injunctive relief in the Superior Court.

DISCUSSION

In deciding a motion brought pursuant to Rule 12(b)(6), the court must accept as true the complaint's well-pleaded factual allegations and any reasonable inferences in the plaintiffs favor that may be drawn from those allegations. Fairneny v. Savogran Co., 422 Mass. 469. 470 (1996). A "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Nader v. Citron, 372 Mass. 96, 98 (1977), quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957). This Court can look only to the complaint in deciding the Rule 12(b)(6) motion; this Court cannot consider any other materials the parties submit with their motions without turning the motion to dismiss into a Rule 56 motion for summary judgment. Mass.R.Civ.P. 12(b); Gibbs Ford, Inc. v. United Truck Leasing, 399 Mass. 8, 13 (1987).

A. Absolute Immunity

As a general rule, most government officials are entitled only to qualified immunity for actions that violate an individual's constitutional rights. Butz v. Economou, 438 U.S. 478, 507 (1978). However, some executive officials are entitled to absolute immunity because of a special nature of their functions. This exception applies to officers whose roles resemble those of prosecutors or judges in adjudicatory proceedings. Id.

In their assertion of absolute immunity, the Commissioners specifically rely on the following language in Butz: "officials who are responsible for the decision to initiate or continue a proceeding subject to agency adjudication are entitled to absolute immunity from damages liability for their parts in that decision." Butz, 438 U.S. at 516 (emphasis added). The Commissioners claim that their roles are similar to those of prosecutors because they are responsible for decisions as to whether to initiate an investigation of a strike, whether to find the strike unlawful, and what actions to take in the event of a strike. This argument fails because the Commission's investigation under G.L. c. 150E, § 9A(b) is not an adjudicatory proceeding. Labor Relations Commission v. Fall River Educators' Association, 382 Mass. 465, 469-470 (1981).

Furthermore, the Court emphasized that absolute immunity was only appropriate when officials participated in proceedings subject to safeguards similar to those provided by Federal Administrative Procedure Act. Butz, 438 U.S. at 513. However, the requirements of the State

Administrative Procedure Act do not apply to the Commission's investigatory hearings. Labor Relations Commission, 382 Mass. at 470. Thus, the procedural safeguards that must be present in order for an official to be protected by absolute immunity are missing in the Commission's investigation.

Therefore, the Commissioners' roles do not resemble those of prosecutors or judges in adjudicatory proceedings and they are not entitled to absolute immunity.

B. Qualified Immunity

The doctrine of qualified immunity shields government officials, performing discretionary tasks from liability for civil damages under both Federal and State law insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. For a right to be clearly established, the unlawfulness of the defendants' conduct must be apparent based on then existing law. To determine whether a reasonable official would have known that his conduct violated a clearly established right, we make an objective inquiry into the legal reasonableness of the official action. That determination is a question of law. The qualified immunity standard gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law.

Ahmad v. Department of Correction, 446 Mass. 479, 484-485 (2006) (internal citations and quotations omitted).

"Ordinarily, the earliest stage of litigation at which qualified immunity will be decided will be summary judgment." Gutierrez v. Massachusetts Bay Transportation Authority, 437 Mass. 396, 404 (2002). However, "[i]f it is evident from the allegations of the complaint alone that the defendant is entitled to qualified immunity, the matter may be decided by means of a motion to dismiss." Id. "[T]he relevant inquiry is 'whether a reasonable official could have believed his actions were lawful in light of clearly established law and the information that the official possessed at the time of his allegedly unlawful conduct.'" Ahmad, 446 Mass. at 485, quoting Clancy v. McCabe, 441 Mass. 311, 317 (2004).

The Union argues that the Commission's order overruled a series of prior decisions by the Commission, and, therefore, the Commissioners knew that their order violated well-established law. It is true that prior to this case, the Commission adhered to a policy of not issuing an order against the Union until its membership actually voted to strike. It is possible that this policy reflected a concern about possible impact of such an order on the Union's right to free speech. See City of Worcester and Worcester Vocational Teachers Association, SI-198 (April 23, 1987). However, the Commission has also clearly articulated in those previous orders a belief that an order prohibiting "actual withholding of services and any accompanying Union inducement, encouragement, or

condonation ... [did] not inhibit any right employees may have to advocate a strike." Id. n. 2.

Moreover, the Commissioners could reasonably conclude based on existing case law that the Commission's orders did not inhibit protected speech because these orders were not self-enforcing. Since "a violation of the Commission's order is not by itself a contempt or a criminal act, the only 'sanction' available to the Commission is to issue an order against the Union which cannot be enforced except by a later court order issued after a judicial hearing." Boston Teachers Union v. Edgar, 787 F.2d 12, 18 (1st Cir. 1986).

The Commission's Final Order does not prohibit debate. It does prohibit the actual conduct that is illegal under G.L. c. 150E, §9A. Specifically, it prohibits the Union and its members from engaging in a strike and from encouraging or condoning such a strike. Thus, in light of established law and information available to the Commissioners at the time of their decision, it was reasonable for them to conclude that the Final Order was lawful. Therefore, the Commissioners are entitled to qualified immunity and their motion to dismiss the counterclaim against them for damages should be allowed.

C. Union's failure to follow statutory procedures to resolve the dispute

The Commissioners argue that the counterclaim should be dismissed because the Union failed to follow impasse procedures as prescribed by G.L. c. 150E, § 9. The Commissioners' argument is based on the Supreme Judicial Court's decision in

Labor Relations Commission v. Chelsea Teachers' Union, 400 Mass. 120 (1987).

The facts in Chelsea are similar to the facts in this case. There, the Chelsea Teachers' Union proceeded to vote and actually go on strike when its negotiations with the School Committee did not result in agreement. The School Committee petitioned the Labor Relations Commission for investigation, and the Commission issued an order requiring the Chelsea Teachers' Union to return to work. The Commission filed a complaint in the Superior Court for enforcement of its order and, later, for contempt. During the civil contempt proceedings, the Chelsea Teachers' Union raised, as a defense, the issue of constitutionality of G.L. c. 150E, §9A. The Chelsea Teachers' Union argued that the statute was unconstitutional on its face and as applied because public employees had a constitutional right to strike. The Supreme Judicial Court noted that the constitutional challenge was raised prematurely.

> If, when collective bargaining does not succeed in producing an agreement, public employees have a constitutional right to strike, in spite of the prohibition of § 9A(a), that right can be exercised only after the employees have followed the procedures for resolution of the impasse set forth in § 9 or on a showing that in the circumstances the imposition of those procedures would be unconstitutional. The Union did not pursue these statutory procedures and thus we need not reach the issue of the unconstitutionality of the prohibition of § 9A against strikes by public employees.

Chelsea Teachers' Union, 400 Mass. at 124 (emphasis supplied).

In this case, the Union claims that it had a constitutional right to hold a debate and a vote on whether to engage in a strike. Following the reasoning in Chelsea, if, when all efforts to reach a collective bargaining agreement fail, the Union has a constitutional right to vote on a strike, that right does not arise until after the Union has followed the statutory procedures. The Union has not done that. Therefore, as in Chelsea, the Union's constitutional claim is premature, and the counterclaim against the Commissioners should be dismissed.

ORDER

For the foregoing reasons, the Commissioners' motion to dismiss the counterclaim is ALLOWED.

12/31/07
DATE

/s/ Geraldine S. Hines
Geraldine S. Hines
Justice Superior Court

APPENDIX G

COMMONWEALTH EMPLOYMENT RELATIONS BOARD[1] & another[2]

v.

BOSTON TEACHERS UNION, LOCAL 66, AFT, AFL-CIO & others.[3]

No. 08-P-1290.
Argued March 11, 2009.
Decided June 25, 2009.

Background: Employment Relations Board filed complaint against city teachers' union, seeking enforcement of its order requiring union to rescind and disavow its motion for a strike vote in connection with negotiations over new collective bargaining agreement (CBA). The Superior Court Department, Suffolk County, Bruce R. Henry and Geraldine S. Hines JJ., issued preliminary injunction prohibiting union and its members from engaging in or threatening a strike, and, thereafter, on Board's complaint for contempt, found union to be in contempt, ordered union to pay $30,000 to Commonwealth's general fund, and denied union's motion for a stay. Union filed motion for a stay with

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[1] Formerly the Labor Relations Commission. See St.2007, c. 145, § 5.

[2] Boston School Committee, intervener.

[3] Officers and executive board members of the Boston Teachers Union. The defendants are referred to collectively as the union.

the single justice of the Appeals Court, who denied it. Union appealed.

Holdings: The Appeals Court, Graham, J., held that:

(1) substantial evidence supported Board's conclusion that union violated statute prohibiting public employees and their unions from inducing, encouraging, or condoning a strike, and

(2) preliminary injunction prohibiting union and its members from engaging in or threatening a strike placed no prior restraint upon union to engage in public speech and debate.

Affirmed.

Matthew E. Dwyer, Boston, for the defendants.

John Foskett, Boston, for the intervener.

Present: GRAHAM, DREBEN, & SIKORA, JJ.

GRAHAM, J.

[*501] The Boston Teachers Union, Local 66, AFT, AFL-CIO (union) appeals from a judgment ordering it to pay $30,000 to the general fund of the Commonwealth, following an adjudication that the union was in contempt of an order of the Superior Court. In the order, the union was found to have violated the provisions of G.L. c. 150E, § 9A, which prohibits public employees and their unions from inducing, encouraging, or condoning a strike. The

union contends that the judge's order, issued after the union set a date for a strike vote, but prior to the actual strike vote, violated the union members' rights under the First Amendment to the United States Constitution by imposing a prior restraint upon the union's right to free speech and assembly. We affirm.

Background. The union represents teachers and aides employed in Boston's public school system by the Boston School Committee (school committee).[4] As the certified bargaining representative for public employees, the union's collective bargaining relationship is governed by G.L. c. 150E, §§ 1 et seq. (Act). The Commonwealth Employment Relations Board (board) is charged with administering and enforcing the Act.

General Laws c. 150E, § 9A(*a*), added by St.1973, c. 1078, § 2, prohibits public employees and their organizations from engaging in a strike, and further provides that "no public employee or employee organization shall induce, encourage or condone any strike, work stoppage, slowdown or withholding of services by such public employees." General Laws c. 150E, § 9A(*b*), directs the board to prevent or correct violations of § 9A(*a*) as follows: [***774**] "Whenever a strike occurs or is about to occur, the employer shall petition the [board] to make an investigation. If, after investigation, the [board]

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[4] The union represents approximately 8,000 teachers, nurses, other professional and paraprofessional employees, and certain substitute teachers who work for the school committee. There are about 149 schools in the Boston public school system, and approximately 58,000 students attend those schools.

determines that any provision of paragraph (*a*) of this section has been or is about to be violated, it shall immediately set requirements that must be complied with, including, but not limited to, instituting appropriate proceedings in the superior court for the county wherein such violation has occurred or is about to occur for enforcement of such requirements."

[***502**] The events leading to the Superior Court action began in December of 2006. The school committee and the union were parties to a collective bargaining agreement that expired on August 31, 2006. Since January, 2006, the parties had been involved in unsuccessful and acrimonious negotiations for a successor collective bargaining agreement. Convinced that the pressure of a pending strike vote was needed to motivate compromise by the school committee on terms of a new collective bargaining agreement, the union, on January 6, 2007, posted on its Web site an "emergency" "e-Bulletin" announcing a motion "[t]o place before the membership on February 14, 2007 for discussion, consideration, and debate by that body, in accordance with the bylaws, the question whether there should be a one-day strike on February 15, 2007 or on such other dates as may be chosen by the membership."

The e-Bulletin stated that the bargaining sessions over the previous twelve months "have not been productive" and that the parties "are still far apart on key issues"; described the school committee's proposal as "insulting to us"; and asserted that "[t]he school committee is apparently willing to foist the

contract settlement on the new superintendent, using stall and crawl tactics." The e-Bulletin advised the union members that, in accordance with the motion, "over the next five weeks, we will be preparing for all exigencies that could result." It also scheduled "an emergency Area Captains meeting" for January 11, 2007, "an emergency, sign-in Building Representatives meeting" for February 1, 2007, and the strike vote meeting for February 14, 2007.

On January 7, 2007, the union president telephoned the Boston school superintendent and gave him a "heads up" about the February 14, 2007, strike vote and the February 15, 2007, strike date. Then, on January 11, 2007, the union advised its members by way of another e-Bulletin that on the previous day the membership had voted to approve the motion for "a strike vote to be taken" at the February 14, 2007, meeting. The e-Bulletin noted that the January 10, 2007, meeting "was [the] highest-attended membership meeting in over two years" and that the vote "was unanimous."[5]

[*503] Meanwhile, the school committee, anticipating that union membership would authorize a strike, petitioned the board on January 9, 2007, to initiate an investigation pursuant to G.L. c. 150E, § 9A(*b*). The board conducted an investigation and held a hearing during which the parties had an opportunity to present evidence and examine witnesses. Following the investigation, the board concluded that although a strike vote had not yet

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[5] February 14, 2007, was a school day. The strike vote meeting was scheduled to begin that day at 4:00 P.M.

been taken and approved by the union membership, the union's actions were "reasonably construed as constituting 'induce[ment], encourage[ment] or condon[ation of] any strike, work stoppage, [**775] slowdown or withholding of services by such public employees' " in violation of § 9A(*a*); and that a strike was "about to occur."[6] Acting pursuant to § 9A(*b*), the board issued an order that required the union, its officers, and its executive board members, inter alia, to rescind and disavow their motion for a strike vote.

The union failed to comply with the board's order, and on January 31, 2007, the board held a compliance hearing. While the union appeared at the hearing, it offered no evidence that it had complied with any of the requirements of the board's order. The school committee presented the board with copies of e-Bulletins and union newspaper articles posted after the board had issued its order, which demonstrated the union's noncompliance with the board's order. One article quoted an executive board member: "waiting any longer is not an option." The article further noted that the members left a January, 2007, meeting "with a 'steely willingness to strike if the School Committee forces [their] hand.' " On February 6, 2007, the board issued a decision in

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[6] The board ruled: "We construe the phrase 'about to occur' that appears in Section 9A(b) to include situations where actions by the employee organizations, their officials or members demonstrate that an actual threat of strike, work stoppage, or slowdown exists so that public officials would reasonably engage in contingency planning, to prevent the interruption of important public services."

which it found that the union had failed to comply with the board's order.

Superior Court proceedings. After the union failed to comply with the order, the board filed a complaint in the Superior Court seeking enforcement of its order.[7] The school committee was [*504] allowed to intervene as a plaintiff. A judge of the Superior Court held an evidentiary hearing on February 12, 2007. The following day, the judge granted the board and the school committee a temporary restraining order.[8] In his order, the judge found that the union had engaged in prohibited § 9A(*a*) activities, and found that a strike by the Union was "about to occur." He therefore (a) enjoined the union, its members, officers, and executive board members from engaging in or threatening a strike or work stoppage; (b) enjoined the union from inducing, encouraging, or condoning any strike or work stoppage; and (c) required the union, by 11:00 A.M. on February 14, 2007, to disavow, publicly, the motion for a strike vote, notify its members of the disavowal and the members' obligation to perform their duties and refrain from participating in a strike. The union was also required to inform the members of the provisions of §§ 9A(*a*) and (*b*) of G.L. c. 150E, and of the board's order.

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[7] The union filed a counterclaim seeking a declaration that the board's order violates its "rights to free association and free expression."

[8] The order was subsequently converted to a preliminary injunction.

On February 14, 2007, the day of the scheduled vote, the union sought a stay from the Superior Court. That motion was denied and the union immediately filed a motion for a stay with the single justice of this court under Mass.R.A.P. 6(a), as amended, 378 Mass. 930 (1979). On the afternoon of February 14, 2007, the single justice heard the motion and denied it.

No strike vote occurred on February 14, 2007, and there was no strike on February 15, 2007. Instead of providing the union membership with the notices set out in the judge's order, the union issued a "special" e-Bulletin dated February 14, 2007, in which it announced that "[t]he following [***776***] motion passed the [union] membership this afternoon: To recess today's meeting to 2/28/07 and to defer, in light of recent developments, any discussion, consideration and debate on the Executive Board's December 20, 2006 motion to that meeting." This action prompted the board to return to the Superior Court and file a complaint for contempt.

After an evidentiary hearing, the judge found the union in contempt of his earlier order, and imposed a prospective "coercive fine" against the union. The union complied with the judge's order the following day, and later filed a timely appeal to this court.

[1] [***505***] *Discussion.* The union argues that the board prematurely and improperly concluded that a strike was "about to occur." The union further argues that the board has long held that the trigger for a determination that an employee organization is about to strike is when "certain conditions precedent

have been satisfied such that it can be said that no further union action is necessary for a strike to commence." See *City of Worcester,* 13 M.L.C. 1627, 1630 (1987). The trigger, the union notes, has always been the actual strike vote by union membership. See *Boston Sch. Comm.,* 10 M.L.C. 1289, 1290 (1983); *Boston Teachers Union Local 66, MFT, AFT, ACL-CIO,* 27 M.L.C. 32, 34 (2000).

The union acknowledges that, in the circumstances of this case, the board's ability to intervene before any actual strike is significantly impaired, but argues that such impairment is relatively minor, and that the board's investigation would be simplified because "it will be considerably easier for the employer-petitioner to prove its case if a strike has already commenced when a strike investigation hearing is convened." We are not persuaded. The purpose of the Act, set forth in clear and unequivocal language, is to allow the board to intervene in a labor dispute at a point where the board may set the requirements necessary to prevent an illegal strike that is about to occur. See *Utility Workers of America, Local 466 v. Labor Relations Commn.,* 389 Mass. 500, 504-505, 451 N.E.2d 124 (1983) (strikes by public employees "may create exigent and unpredictable situations," therefore public employers may act in good faith "to prevent public services from being disrupted").

The longstanding "actual vote" rule assumes that a public employer will have sufficient time to engage the process set forth in the Act once a strike vote has been held. But see *id.* at 504, 451 N.E.2d 124 ("A certain amount of delay is ... inevitable under the

petition procedure"). That assumption is invalid in the particular circumstances of this case, and we therefore reject the interpretation of the statute suggested by the union because it would make the statute ineffective. See *O'Shea v. Holyoke,* 345 Mass. 175, 179, 186 N.E.2d 608 (1962) (interpretation that would make a statute "wholly ineffective is strong indication that this interpretation does not reflect the legislative intention").

[*506] We conclude that the evidence before the board amply supported its conclusion that the union violated the provisions of § 9A(*a*) by encouraging and inducing a strike. That evidence included the e-Bulletins and articles from the union newspaper. A reasonable inference that the union was involved in encouraging a strike was warranted, if not compelled, by all of the evidence.

[2] [3] The union also alleges that the judge imposed a judicial prior restraint upon the union's exercise of protected speech and right to peaceful assembly guarantees in the First Amendment and in [**777] art. 16 of the Massachusetts Declaration of Rights by enforcing the board's alleged unconstitutional application of § 9A and issuing an injunction prohibiting the union "from gathering to discuss the merits of a strike and requiring it to disavow prior statements." We disagree. The union concedes, as it must, that there is no constitutional right of public employees to strike. See *Labor Relations Commn. v. Chelsea Teachers Union, Local 1340,* 400 Mass. 120, 124-125, 507 N.E.2d 1051 (1987). In addition to barring strikes, § 9A also makes it unlawful for a

public employee or union to "induce, encourage or condone" a strike.

The injunction issued by the judge imposed four requirements, namely, it enjoined the union, its executive board, and its members from engaging in or threatening a strike, and prohibited the union, its executive board, and its officers from inducing, encouraging, or condoning a strike; ordered them to disavow the executive board vote that scheduled the strike vote; required them to notify the members of their legal obligation not to engage in a strike; and required them to inform the members of the provision of § 9A and of the board's decision. The injunction placed no prior restraint upon the union to engage in public speech or debate, but rather prohibited it from engaging in actions that properly were prohibited under § 9A.

Moreover, to the extent that the conduct regulated by § 9A "includes both 'speech' and 'nonspeech' elements, the purpose of the statute is entirely unrelated to the suppression of free expression." *Zora v. State Ethics Commn.*, 415 Mass. 640, 651, 615 N.E.2d 180 (1993). The board has a substantial interest in preventing a strike by the union members, and "[a]ny incidental limitation of First Amendment freedoms" is justified. *Ibid.*

[***507**] Accordingly, the judgment is affirmed.

So ordered.

APPENDIX H

Supreme Judicial Court for the
Commonwealth of Massachusetts
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One Pemberton Square, Suite 1400, Boston,
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Telephone 617-557-1020, Fax 617-557-1145

Matthew E. Dwyer, Esquire
Dwyer and Duddy
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RE: Docket No. FAR-18064

COMMONWEALTH EMPLOYMENT RELATIONS BOARD & another

vs.

BOSTON TEACHERS UNION, LOCAL 66, AFT, AFL-CIO & others

Suffolk Superior Court No. SUCV2007-00587
A.C. No. 2008-P-1290

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on 09/30/09, the above-captioned Application for Further Appellate Review was denied.

Susan Mellen, Clerk

Dated: September 30, 2009

To: Maydad D. Cohen, Esquire
John Foskett, Esquire
Matthew E. Dwyer, Esquire
John Reinstein, Esquire

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(2)

Supreme Court, U.S.
FILED
JAN 29 2010
OFFICE OF THE CLERK

No. 09-770

In The
Supreme Court of the United States

THE BOSTON TEACHERS UNION, LOCAL 66, AFT, MFT, AFL-CIO, ET AL.,
Petitioners,

v.

COMMONWEALTH EMPLOYMENT RELATIONS BOARD AND BOSTON SCHOOL COMMITTEE,
Respondents.

On Petition for Writ of Certiorari to the Massachusetts Appeals Court

BRIEF IN OPPOSITION

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January 29, 2010

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QUESTION PRESENTED

Whether an injunction issued under a Massachusetts statute infringed the First Amendment rights of a public employee union where (1) the injunction merely required it to disavow conduct orchestrating a vote by its membership to call a strike which is validly prohibited by state law and (2) the injunction did not constrain the union in any way from advocating the abstract proposition of a right to strike or from communicating its views about collective bargaining negotiations.

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II. EVEN IF THE ACTION WHICH THE INJUNCTION REQUIRED THE UNION TO DISAVOW COULD BE CONSIDERED "ADVOCACY", IT WAS ADVOCACY DIRECTED AT PROMOTING AN ILLEGAL STRIKE. THE INJUNCTION THEREFORE IS CONSISTENT WITH THIS COURT'S LONG-STANDING PRECEDENT. 11

III. THE PETITION CHALLENGES A STATE COURT DECISION THAT AN ADMINISTRATIVE AGENCY'S PRIOR CONSTRUCTION OF A STATE STATUTE WAS WRONG AND WAS CORRECTLY ABANDONED IN THIS CASE. IT THEREFORE RAISES NO QUESTION WHICH IS APPROPRIATE FOR RESOLUTION BY THIS COURT. 14

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Respondent Boston School Committee ("the School Committee") respectfully opposes the petition of Boston Teachers Union, Local 66 and its officials ("petitioner") for a writ of certiorari to review the decision of the Massachusetts Appeals Court dated June 25, 2009.

OPINIONS BELOW

The Appeals Court's decision is reported at *Commonwealth Employment Relations Board v. Boston Teachers Union, Local 66*, 74 Mass.App.Ct. 500, 908 N.E. 2d 772 (2009). The decision of the Supreme Judicial Court which denied petitioner's application for further appellate review is not reported but is referred to in a table at 455 Mass. 1102 , 914 N.E.2d 330 (2009).

STATEMENT OF THE CASE

Petitioner is a union which represents school teachers employed by the Boston public schools. Conceding that it is lawfully barred under a Massachusetts statute from ""induc[ing], encourag[ing], or condon[ing]" a strike by its members, petitioner nevertheless asserts that a judicial injunction which carefully tracked the statute violated its First Amendment speech rights. The injunction did nothing more than enforce the statute's plain (and unchallenged) terms and ordered that petitioner disavow the procedure which it had set in process for orchestrating an illegal strike.

Petitioner's theory is that a statute which properly authorizes a procedure to prevent strikes can nonetheless be circumvented by a union's

manipulation of dates so that the statutory procedure cannot be completed before the unlawful work stoppage takes place. The petition is grounded in two fictions. First, it assumes wrongly that this lawsuit is about exercising the right to "debate" the question of strikes by public employees. The reality is that the case concerns plainly illegal acts and has no bearing on whether petitioner or its members may discuss or debate that issue or any other. The petition also assumes, incorrectly, that the state courts enjoined "debate" and caused petitioner grave doubt regarding what it may communicate to its members during collective bargaining. The reality is that no reading of the injunction could possibly cause any uncertainty that petitioner is free to vigorously criticize the School Committee's negotiating stance and to advocate rejection of the School Committee's proposals.

The Massachusetts Appeals Court decision which affirmed the injunction and which is the subject of this petition raises no important question of federal law that requires settlement by this Court. Moreover, to the extent that First Amendment speech interests are even implicated the court's decision is in no respect inconsistent with this Court's relevant precedent. There are, accordingly, no grounds which render this Court's exercise of its certiorari jurisdiction appropriate and the petition should be denied.

1. Massachusetts Statutory Scheme

For decades Massachusetts has recognized a "traditional absolute prohibition of strikes by public employees ...". *Dir. of Div. of Employee Relations v. Labor Relations Comm'n,* 370 Mass. 162, 167-68, 346 N.E.2d 852, 856 (1976) [citation omitted]. Public

employees were first given the right to collectively bargain the terms and conditions of their employment in 1965 with the enactment of G.L. c. 149, §§ 178G-N. As part of this legislative scheme, § 178M codified the longstanding policy against strikes in the public service and prohibited public employees from "engag[ing] in, induc[ing], or encourag[ing]" any strike or work stoppage.[1] The current statute, G.L. c. 150E, § 9A, was enacted in 1973.[2] Section 9A(a) expressly bars public employees *and* their unions from "engag[ing] in", and from "induc[ing], encourag[ing], or condon[ing]", any strike or work stoppage. This prohibition is not self-enforcing, however. Section 9A(b) specifies a two-step procedure in which the employer must first petition the respondent Commonwealth Employment Relations Board ("the Commission") for a determination that a provision of § 9A(a) "has been or is about to be violated".[3] If the Commission makes such a determination and "sets requirements", it may then "institut[e] appropriate proceedings in" the Superior Court to enforce its ruling.[4]

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[1] *See* St. 1965, c. 763, § 2.

[2] *See* St. 1973, c. 1078, § 2.

[3] At the time of the underlying events the state agency was called the "Labor Relations Commission". Subsequent to issuance of the injunction in this case the Commission's name was changed by St. 2007, c. 145, § 5, which amended G.L. c. 23, § 90, and the respondent was substituted as a party. The agency's name at the time of the injunction was sought and obtained is used herein.

[4] That is what happened here, resulting in the injunction which lies at the heart of this petition. The School Committee, which is charged with operation of the Boston public schools and which

There is no doubt that § 9A(b), which authorizes relief where a violation is "about to occur", is directed at preventing unlawful conduct before it takes place. *Dir. of Div. of Employee Relations v. Labor Relations Comm'n, supra* at 166; 856. Because, however, Massachusetts requires an initial administrative proceeding *prior* to seeking and obtaining an injunction, the Supreme Judicial Court has observed that the § 9A(b) procedure "necessarily involve[s] some delay ... [which] is ... inevitable under the petition procedure" even though "[s]trikes by public employees, ... may create exigent and unpredictable situations which require an immediate response". *Utility Workers of America, Local 466 v. Labor Relation Comm'n,* 389 Mass. 500, 504, 451 N.E.2d 124, 127 (1983). It is in this context that the challenged decision must be evaluated.

2. Facts

Petitioner sketches a skeletal and misleading picture of what took place. It points only to its motion to put before its members on February 14, 2007 "for discussion, consideration and debate" "the question whether there should be a one-day strike" the next morning [Pet. 3-4; Pet. App. 9a]. Petitioner mentions only a small sample of the evidence cited by the Commission in support of its conclusion, culling out that involving petitioner's criticism on its website of the School Committee's negotiating stance [Pet. 24; Pet. App. 10a-11a]. The Commission, however, found

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would have been directly harmed by an illegal strike, moved to intervene as a plaintiff in the Superior Court and its motion was allowed.

facts well beyond those selectively referenced in the petition. The Commission focused on petitioner's extensive facilitation of a strike and this undisputed evidence furnished ample support for its, and then the Superior Court's, conclusion that a clear violation of the statute was afoot.

First, petitioner's January 6, 2007 announcement on its website specified that the motion was "in accordance with the bylaws" [Pet. App. 9a]. Art. X, sec. 1(b) of petitioner's bylaws states "[a] general membership meeting is the only body which may accept or reject contracts or call a work stoppage." [Pet. App. 6a]. Moreover, petitioner's announcement informed its members that petitioner was "preparing for all exigencies"; scheduled "an emergency Area Captains meeting"; and scheduled "an emergency, sign-in Building Representatives meeting" [Pet. App. 11a-12a]. On the same date, petitioner's president notified the superintendent of schools that its executive board "had voted to take a motion to the membership to take a strike vote on February 14, 2007, with a strike date of February 15, 2007, if the motion passed" [Pet. App. 12a-13a]. Finally, on January 11, 2007 petitioner posted another announcement on its website. This announcement stated that during a meeting the day before which was attended by more than 650 members, the motion to put the issue of a strike before the membership on February 14 (which petitioner characterized as "self-

explanatory") had passed by "unanimous" vote [Pet. App. 13a].[5]

3. Commission Decisions

Petitioner's account of the rulings by the Commission is similarly and deceptively truncated. Based on the foregoing evidence the Commission decided on January 18, 2007 that an illegal strike was "about to occur" and that petitioner was "inducing, encouraging, and condoning such action" in violation of the statute [Pet. App. 19a-20a]. The Commission found that petitioner's "manipulation" of the dates for the vote and the strike would "preclude timely and effective enforcement to prevent, and not merely interrupt, actions that the Law prohibits" [Pet. App. 20a]. The Commission therefore abandoned its prior, agency-developed interpretation of the statute which had required "an actual strike vote as a predicate" to preventive action [Pet. App. 20a].[6] It ruled that petitioner had "started in motion the approval and authorization by a vote of the general membership to engage in a one-day strike as early as February 15, 2007" [Pet. App. 21a].

Cataloguing the financial harm which would affect the city and its schools, the "non-economic, incalculable harm and chaos" which would ensue, the resulting deprivation of 58,000 students' right to an education, and the extensive, detrimental impacts on

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[5] Subsequently, petitioner's official newspaper stated that its members left this meeting "with a 'steely willingness to strike if the School Committee forces [their] hand'" [Pet. App. 36a].

[6] *See, e.g., Boston Sch. Committee,* 10 MLC 1289, 1290 (1983).

their families and on law enforcement, the Commission imposed several requirements, including petitioner's rescission and disavowal of its motion [Pet. App. 21a-23a, 25a-26a]. After petitioner failed to comply, the Commission issued a determination of non-compliance on February 6, 2007 and then filed a lawsuit seeking injunctive relief in Superior Court [Pet. App. 28a-41a].

4. Superior Court and Appeals Court Decisions

Following a hearing the Superior Court issued a temporary restraining order and preliminary injunction on February 13, 2007. The court found that the Commission had met its burden of proof under § 9A and ordered six injunction provisions. Pertinent to the petition are paragraphs 3 and 4 which required petitioner, its officers, and its executive board to "publicly disavow" the decision to place before the membership on February 14 the motion regarding a strike vote [Pet. App. 45a-47a].

The Appeals Court affirmed, holding that the Commission's altered interpretation of § 9A is the correct construction [Pet. App. 79a-80a]. That court "reject[ed]" petitioner's insistence on the "actual vote" rule "because it would make the statute ineffective" [Pet. App. 80a]. It is the "disavowal" provision in the injunction order which is the subject of the Appeals Court's decision and of the petition at bar.[7]

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[7] The remaining provisions were simply couched in terms of the statute's language [Pet. App. 45a-47a]. Neither the Commission nor the Superior Court ever entered any order which barred

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE INJUNCTION MERELY REQUIRED THE UNION TO DISAVOW THE MOTION WHICH UNDER ITS BYLAWS WAS THE NECESSARY STEP FOR CALLING AN ILLEGAL STRIKE. THE CONDUCT ENJOINED THEREFORE IS NARROWER THAN THAT WHICH THE UNION CONCEDES IS PROPERLY REGULATED BY THE STATUTE AND THE APPEALS COURT'S DECISION RAISES NO ISSUE FOR THIS COURT'S RESOLUTION.

Throughout these proceedings petitioner has never attacked the statute as facially unconstitutional or overbroad. Petitioner therefore admits that Massachusetts lawfully may prohibit it from exercising the activities which are specifically proscribed by § 9A. Instead, its theory has always been that something about the Commission's and the Superior Court's application of the statute contravenes the First Amendment. The argument makes no sense in light of the record.

As noted, § 9A(a) makes it unlawful for petitioner to "induce, encourage, or condone" a strike. The injunction entered by the Superior Court is, if anything, narrower than the authority conferred by

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petitioner or its members from debating whether public employees should have the right to strike [Pet. App. 24a-27a; 45a-47a]. Likewise, neither tribunal ever entered any order which enjoined petitioner from using its website to criticize, vehemently, forcefully, or in any other manner, the School Committee's bargaining position [Pet. App. 24a-27a; 45a-47a].

the statute. It regulates activities which are well within the categories set forth in § 9A and which fall far short of touching their outer limits. Paragraph 3 of the court's injunction provisions is at the center of this dispute. That provision, however, merely ordered petitioner to "publicly disavow" the December, 2006 vote of its executive board to schedule a meeting at which a vote would be taken on whether to call an illegal strike the next morning [Pet. App. 46a]. Petitioner's motion was the *sine qua non*, and last required step, under its bylaws for "call[ing]" an illegal "work stoppage" [Pet. App. 6a]. The court therefore only required petitioner to repudiate an act which set in motion the process of violating the statutory ban on strikes.

The remaining paragraphs were even more narrowly tailored to fall within the scope of § 9A(a). Paragraph 4 did nothing beyond specifying the method for accomplishing effective notification of the disavowal to petitioner's membership [Pet. App. 46a]. Paragraphs 1 and 2 incorporated the language of the statute and enjoined violation of those terms [Pet. App. 45a-46a]. Paragraph 5 ordered petitioner to notify its members of their obligation "not to participate in any form of strike or work stoppage" [Pet. App. 47a]. Finally, paragraph 6 required petitioner to inform its members of the "provisions of G.L. c. 150E, §§ 9A(a) and (b) and of the contents of the [Commission's] Order" [Pet. App. 47a]. Nothing in the Superior Court's injunction purported to cabin "debate" or to restrain petitioner's communications to its members about the parties' negotiations [Pet. App. 45a-47a]. The Appeals Court decided the question correctly and succinctly. It held that "[t]he injunction placed no prior restraint upon the union to engage in public speech or debate,

but rather prohibited it from engaging in actions that properly were prohibited under § 9A." [Pet. App. 81a].

Petitioner's argument that the injunction "[r]estrain[ed] a union's leadership from expressing frustration with the progress of contract negotiations to its own members" is unvarnished hyperbole which clashes with the plain English of the order [Pet. 24; Pet. App. 45a-47a]. Petitioner could have scheduled and staged a "debate" about whether public employees should be able to walk off their jobs. It could have posted daily bulletins on its website criticizing the School Committee's proposals as unfair or unreasonable. Nothing would have happened had it done those things. Instead petitioner went about the business of directly fomenting that which it acknowledges Massachusetts validly forbids. The administrative and judicial responses were carefully targeted to meet the law's proscription.

Had petitioner chosen to attack the terms of the statute its case would still be wanting [*infra* pp. 11-13]. It opted not to do so, however. Given petitioner's concession that § 9A(a) can constitutionally regulate the activities specified in the statute, petitioner has no hope of showing that the Superior Court's narrower enforcement of § 9A raises any federal concerns.

II. EVEN IF THE ACTION WHICH THE INJUNCTION REQUIRED THE UNION TO DISAVOW COULD BE CONSIDERED "ADVOCACY", IT WAS ADVOCACY DIRECTED AT PROMOTING AN ILLEGAL STRIKE. THE INJUNCTION THEREFORE IS CONSISTENT WITH THIS COURT'S LONG-STANDING PRECEDENT.

This case involves governmental regulation which has, at most, only an incidental effect on protected speech and is directed at noncommunicative conduct. The Appeals Court's decision therefore easily survives the test required by *United States v. O'Brien,* 391 U.S. 367, 381-82 (1968). Even if what was enjoined here can be viewed as speech rather than as illegal action, however, petitioner's constitutional argument is barren.

Petitioner, of course, has never argued that public employees have a First Amendment right to strike or to take steps which will launch a strike. This is for good reason because the absence of any such right is well established. *See, e.g., United Steel Workers of America, AFL-CIO v. University of Alabama in Birmingham,* 430 F. Supp. 996, 1001-02 (N.D. Ala. 1977) and cases cited. By ordering petitioner to disavow the process it had commenced, the Superior Court did no more than bar an illegal act without any constitutional implications. Assuming solely *arguendo,* however, that petitioner's orchestration of an illegal strike through the artifice of labeling its motion as one for "debate, discussion, and consideration" satisfies the test for speech, petitioner's case fails. The injunction lies well within the permissible area of

regulation which has always found favor in this Court's decisions.

This Court has long recognized a sharp "distinction between advocacy of abstract doctrine and advocacy directed at promoting unlawful activity ... in [its] opinions ... ." *Yates v. United States,* 354 U.S. 298, 318 (1957). Under this demarcation, statutes which tolerate the former but proscribe the latter will survive constitutional challenge. *Id. See, e.g., Noto v. United States,* 367 U.S. 290, 297-98 (1961), comparing "the mere abstract teaching of theory" with "preparing a group for violent action and steeling it to such action"; *Brandenburg v. State of Ohio,* 395 U.S. 444, 447-48 (1969) (per curiam), stating that "[a] statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments". The principle may well be venerable. *See Gitlow v. People,* 268 U.S. 652, 665 (1925), differentiating "philosophical abstraction" from "language of direct incitement". It also remains vibrant, however. *See United States v. Williams,* 553 U.S. 285, , 128 S.Ct. 1830, 1842 (2008), referring to the "important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality."

In the arena of public sector labor relations the lower courts have followed this Court's doctrine faithfully. *United States v. Taylor,* 693 F.2d 919 (CA9 1982), involved a statutory scheme under which (1) a person was barred from employment by the federal government if he "participates in a strike, or *asserts the right to strike*" and (2) a violation was made criminal. *Id.* at 921 [emphasis added]. The court severed these provisions, sustaining those which were

premised on participation in a strike but invalidating those which penalized mere "assertion of the right to strike" because the latter activity "is protected by the First Amendment." *Id.* at 921-22. In *Aurora Ed. Ass'n East v. Board of Ed. of Aurora Public Sch. Dist.*, 490 F.2d 431 (CA7 1973), *cert. denied* 416 U.S. 985 (1974), the court invalidated a school board policy which precluded a teacher from receiving a full salary if he held a belief that teachers should have the right to strike. The court ruled that "the mere philosophical or political assertion of the declarant's belief that he has a right to strike" as a "purely theoretical position" is protected by the First Amendment. *Id.* at 434 and cases cited.

So measured, the Superior Court's injunction order clearly comported with this Court's interpretation of the First Amendment. Petitioner was not engaged in the "abstract advocacy" of a public employee's right to strike. *United States v. Williams, supra* at 1842. Instead, if petitioner's conduct launching the procedure for an unlawful strike can even be characterized as "advocacy", it was advocacy "propos[ing] to engage in illegal activity." *Id.* Indeed, the Superior Court's order would survive a more rigid view of First Amendment constraints on governmental regulation than that which this Court has adopted. Petitioner presents "a classic case where speech is brigaded with action" and the injunction would raise no First Amendment problem even under this more stringent test. *Brandenburg v. State of Ohio, supra,* at 456 (Douglas, J., concurring).

III. THE PETITION CHALLENGES A STATE COURT DECISION THAT AN ADMINISTRATIVE AGENCY'S PRIOR CONSTRUCTION OF A STATE STATUTE WAS WRONG AND WAS CORRECTLY ABANDONED IN THIS CASE. IT THEREFORE RAISES NO QUESTION WHICH IS APPROPRIATE FOR RESOLUTION BY THIS COURT.

Petitioner's argument that the Commission was obliged to follow its own "actual vote" rule of interpretation as the "least restrictive" application of the Massachusetts statute obviously suffers from the mortal flaw that there is no colorable First Amendment violation [Pet. 10, 11, 20-21]. There are additional, fundamental defects in its theory as a basis for this Court's exercise of certiorari jurisdiction, however.

The administrative rule cited by petitioner is just that – an interpretation of the Massachusetts statute's controlling language by the state agency charged with its initial enforcement. The rule was established by the Commission in order to "effectuate the policies of G.L. c. 150E". *Boston Sch. Committee,* 10 MLC 1289, 1290 (1983). It was premised on the Commission's conclusion at the time that where a strike vote has not yet been taken it would be "inappropriate" and "speculati[ve]" to conclude that a violation was about to occur. *Id.* & n.3. *See also City of Worcester,* 13 MLC 1627, 1629 (1987), stating that absent an actual vote to strike it would be improper to decide that "a threatened strike is ... imminent"; *Boston Teachers Union, Local 66,* 27 MLC 32, 34 (2000). This rule derived solely from the Commission's

construction of the language used in § 9A and to no extent from First Amendment concerns, which therefore went unmentioned. *Id.*

The ruling which petitioner now attacks represents nothing more than judicial adoption of the agency's prudent refusal to blindly apply its rule where to do so would emasculate the statute. As noted, the Commission overruled its previous interpretation because it recognized that petitioner's manipulation of the dates for the vote and for the strike would make it impossible to effectuate § 9A's central purpose of preventing the widespread harm caused by an illegal strike [Pet. App. 20a]. Petitioner's concrete steps to mobilize for the strike amounted to a concession that the February 14 vote was a mere formality [Pet. App. 11a-12a]. The Appeals Court rightly confirmed the Commission's abandonment of the ill-advised "actual vote" requirement. The court observed that "[t]he longstanding 'actual vote' rule assumes that a public employer will have sufficient time to engage the process set forth in the Act once a strike vote has been held." [Pet. App. 79a]. Continuing, the court held "[t]hat assumption is invalid in the particular circumstances of this case, and we therefore reject the interpretation of the statute suggested by the union because it would make the statute ineffective." [Pet. App. 80a].

There is nothing controversial or remotely touching on constitutional significance in this decision. The "least restrictive" application of the statute for which petitioner argues is, in reality, no application [Pet. 10, 11, 20-21]. *Cf. United States v. O'Brien, supra* at 381. An administrative agency is free (and in an instance such as this is *obligated*) to conclude that its prior

construction of the governing statute is outdated and that mindless adherence to a rule which undermines that statute should be abandoned. *Cf. MCI Worldcom Comm'ns, Inc. v. Dep't of Telecomm. & Energy,* 442 Mass. 103, 115-16, 810 N.E.2d 802, 812 (2004) [citations omitted]; *Att'y General v. Comm'r of Insurance,* 442 Mass. 793, 800, 817 N.E.2d 742, 748 (2004). The Commission more than adequately explained its overruling of the earlier precedent. It explicitly pointed out that in light of the undisputed facts an inflexible prerequisite of an actual vote "allows for the kinds of strike threats, disruptions, and manipulation of strike votes and strike dates that preclude timely and effective enforcement to prevent, and not merely interrupt, actions that the Law prohibits" [Pet. App. 20a].

More important, the Massachusetts courts, and not the Commission, are charged with the ultimate responsibility for ascertaining the proper construction of this statute's terms. *Mass. Comm. Coll. Council MTA / NEA v. Labor Relations Comm'n,* 402 Mass. 352, 353, 522 N.E.2d 416, 417 (1988). The Appeals Court "reject[ed]" the "actual vote" rule because its application would have completely undermined § 9A [Pet. App. 80a]. In fact, had the Commission clung unblinkingly to that interpretation the court would have been obligated to reverse. *Id.*

In effect, petitioner invites this Court to intervene because a state court has construed a state law in the only manner which could block petitioner's frustration of the statute's lawful, salutary purpose by the contrivance of manipulating dates. The decision of the Appeals Court to adopt the agency's reasoning for its own interpretation of § 9A as a matter of

Massachusetts law affords no occasion for granting the petition, either on the merits or for the purpose of vacating and remanding for reconsideration. This is so regardless of whether the Commission takes no stance on the petition or, instead, indicates that it has now altered its position on the Appeals Court's rejection of the "actual vote" rule.

CONCLUSION

The petition for a writ of certiorari should be denied.

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(3)

SUPREME COURT, U.S.
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No. 09-770

IN THE

Supreme Court of the United States

THE BOSTON TEACHERS UNION, LOCAL 66, ET AL.,

Petitioner,

v.

COMMONWEALTH EMPLOYMENT RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR RESPONDENT COMMONWEALTH EMPLOYMENT RELATIONS BOARD IN RESPONSE TO PETITION FOR CERTIORARI AND SEEKING AN ORDER TO GRANT, VACATE AND REMAND

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SUMMARY OF THE ARGUMENT

Justice Frankfurter once commented that "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee v. Union Planters National Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting). After significant deliberations, the Respondent, Commonwealth Employment Relations Board ("CERB"), the agency statutorily charged with interpreting and applying the Commonwealth's public sector labor relations statute, respectfully requests that the Court grant the Petitioner's request for certiorari, vacate the Massachusetts lower court decisions and remand the matter for further consideration by the CERB. An order granting certiorari, vacating the decision and remanding the case ("GVR") is proper here because the predecessor agency of the CERB, the former Labor Relations Commission ("LRC"), erred by overturning twenty-five years of established precedent that required an actual strike vote by union members as a prerequisite for a finding that a strike in violation of M.G.L. c. 150E, § 9A(a) was occurring or was about to occur. The LRC's imprudent reversal of that long-standing rule gave rise to the Petitioner's First Amendment claim in the petition now before this Court. Accordingly, a GVR order is appropriate to allow the CERB to fulfill its duties as the state agency statutorily designated to interpret and apply the Commonwealth's labor relations law and reassert a long-standing policy that avoids a need for constitutional review of a key provision of Massachusetts labor relations law, M.G.L. c. 150E, *et seq*.

ARGUMENT

A. Standard for Issuing GVR Orders.

"An administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes." *National Labor Relations Board v. Local Union No. 103, Int'l Assn. of Bridge, Structural & Ornamental Iron Workers, AFL-CIO*, 434 U.S. 335, 351 (1978). In those rare but important circumstances where a government agency does admit error, the federal courts have afforded the administrative agency an opportunity to re-examine an incorrect statutory or regulatory standard it is charged with interpreting or implementing. *See, e.g., Lawrence v. Chater*, 516 U.S. 163, 165-67 (1996) (granting the Solicitor General's request for GVR based on a new statutory interpretation taken by the Social Security Administration) (and cases cited therein); *SFK USA, Inc. v. United States*, 254 F.3d 1022, 1025 (Fed. Cir. 2001) (explaining a court's obligation to remand a case to an agency based on an "agency's change in policy or statutory interpretation."); Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs – An Alternative*, 107 Mich. Law. Rev. 711, 732-34 (2009) (charting GVRs granted by the Court that stem from confessions of error by the U.S. Solicitor General and state equivalents since 1975).

A request that this Court issue a GVR order based on an agency's admission of error is considered in light of the deference afforded administrative agency decisions under *Chevron, U.S.A., Inc. v.*

Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984), and deemed proper in either of two scenarios. A reviewing court maintains considerable discretion and can either remand or decide the statutory issue when an agency is either compelled or forbidden by the governing statute to reach a different result. *SFK USA*, 254 F.3d at 1029 (applying a step-one *Chevron* issue standard allowing remand to conserve judicial resources or because agency viewpoint may be useful before judicial review). However, absent a step-one *Chevron* issue, "remand to the agency is required, absent the most unusual circumstances verging on bad faith" since governmental agencies are entitled to formulate policy and make rules "to fill any gap left, implicitly or explicitly, by Congress." *Id.* at 1029-30 (quoting *Chevron*, 467 U.S. at 843) (further citations omitted). Under *Chevron*, an agency must be allowed to assess "the wisdom of its policy on a continuing basis," *Chevron,* 467 U.S. at 864, and this discretion to reconsider policies does not come to an end even after agency action is appealed. *See Auer v. Robbins*, 519 U.S. 452, 462-63 (1997) (deferring to agency's interpretation of its own regulation advanced in litigation).

Accordingly, in *Lawrence,* this Court explained that "a new interpretation of a statute adopted by the agency charged with implementing it may be entitled to deference in the context of litigation to which the Government is a party." 516 U.S. at 171. *Lawrence* thus utilized GVR, applying "deference under the rule of *Chevron*," *id.* at 172, when the Social Security Administration changed its interpretation of its statute during the course of litigation. *Id.* at 164. More recently, the Federal Circuit Court of Appeals applied these principles in

SFK USA, where the Department of Commerce reversed its position in a case on appeal to the Court of International Trade and requested that the case be remanded back to the agency. 254 F.3d at 1026. The Court of International Trade refused to rely on the Department of Commerce's changed position and upheld the Department's initial administrative action. *Id.* at 1026-27. On further review, the Federal Circuit Court of Appeals overturned the Court of International Trade and upheld the Department's right to reconsider its position, finding that remand to the agency was appropriate because the issue on which the Department had changed its position was within the agency's discretion, and that there was no evidence that its new position was taken in bad faith. *Id.* at 1030.

In sum, "[i]f it appears reasonably probable that a confession of error reveals a genuine and potentially determinative error by the court below, a GVR may be appropriate; similarly, we believe that if an agency interpretation is reasonably probably entitled to deference and potentially determinative, we may GVR in light of it." 516 U.S. at 172. In other words, under *Lawrence,* "[i]t is precisely because of uncertainty that" this Court issues a GVR order. *Id.*

B. A GVR Order is Appropriate in This Case Because the CERB Has Admitted That the Former Labor Relations Commission Committed a Determinative Error When it Overruled Twenty-Five Years of Precedent Governing the Administration of the Commonwealth's Ban on Public Sector Strikes.

For twenty-five years, the CERB's predecessor, the former Labor Relations Commission,[1] consistently held that a violation of the prohibition on strikes set forth in M.G.L. c. 150E, § 9A(a)[2] is limited to "situations where the evidence

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[1] Pursuant to St. 2007, c. 145, §§ 5, 7, and 8, effective November 14, 2007, the Commonwealth Employment Relations Board is the successor agency to the Labor Relations Commission for, among other things, the purposes of defending appeals from agency final orders. The events at issue here occurred before the effective date of this law. Since the Board now stands in the shoes of the former Commission for cases arising prior to the reorganization statute, references to the Board are intended to include the former Labor Relations Commission.

[2] In its entirety, § 9A reads as follows:

> (a) No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall induce, encourage or condone any strike, work stoppage, slowdown or withholding of services by such public employees.
>
> (b) Whenever a strike occurs or is about to occur, the employer shall petition the commission to make an investigation. If, after investigation, the commission determines that any provision of paragraph (a) of this section has been or is about to be violated, it shall

indicates that there is no further union action ... necessary before the strike will begin." *City of Worcester and Worcester Vocational Teachers Assn.*, 13 MLC 1627 (1987) (citing *Boston School Committee*, 10 MLC 1289, 1290 (1983), *Boston School Committee*, Case No. SI-189 (Sept. 10, 1986) and *Boston School Committee*, Case No. SI-140 (Sept. 10, 1981)); *see also Boston School Committee*, 27 MLC 32, 34, 2000 WL 35733304 (2000) (dismissing a strike petition because "a strike vote has not yet occurred"); *accord, Brockton School Committee*, 20 MLC 1253, 1258 (1993). This longstanding rule was premised on the view that it was speculative, and therefore improper, to issue an order prohibiting a strike when some further action must be taken by the union membership before a strike can occur. *City of Worcester*, 13 MLC at 1629.

Thus, since at least 1981, this agency "declined to issue orders prohibiting strike activity where, despite the Union leadership's recommendation, the membership had not yet voted to engage in a work stoppage. Declining to speculate upon the outcome of the pending strike vote, the Commission concluded in those cases that no strike was yet imminent." *City of Worcester*, 13 MLC at 1629; *Boston School Committee*, 10 MLC 1290 (dismissing the strike petition as speculative because the strike vote was merely scheduled and finding it

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> immediately set requirements that must be complied with, including, but not limited to, instituting appropriate proceedings in the superior court for the county wherein such violation has occurred or is about to occur for enforcement of such requirements.

M.G.L. c. 150E, § 9A.

"equally plausible that the general membership either will not vote on the question or will vote against any unlawful job action."). This rule has been upheld by state and federal courts. *Boston Teachers Union, Local 66, AFT, AFL-CIO v. Edgar*, 787 F.2d 12, 17 & n.5 (1st Cir. 1986) (noting that "[t]he Commission has determined on other occasions that a strike is deemed 'about to occur' only when the Union membership actually votes to strike."); *Lenox Education Association v. Labor Relations Commission*, 393 Mass. 276, 285-86, 471 N.E.2d 81, 87-88 (1984) (recognizing that a certain amount of delay is inevitable under the strike petition procedure thereby not precluding an employer from engaging in self-help until it has petitioned for a strike investigation and the CERB has set forth its requirements) (citing *Utility Workers of America, Local 466 v. Labor Relations Commission*, 389 Mass. 500, 451 N.E.2d 124 (1983)).

That long-standing precedent appropriately balanced the statutory rights of employees and employers, fulfilled the purposes of M.G.L. c. 150E, and successfully avoided constitutional challenges. In *Utility Workers of America, Local 466 v. Labor Relations Commission*, 389 Mass. 500, 504-05, 451 N.E.2d 124, 127 (1983), the Massachusetts Supreme Judicial Court upheld the agency's interpretation of G.L. c. 150E, § 9A(a) under a *Chevron*-like deference standard. The court extended deference to the agency's own interpretation of its statutory obligation to grapple with the challenges posed by the inevitability of delay that occurs when administering the statute's strike petition procedures. In *Boston Teachers Union*, 787 F.2d at 18-19, the First Circuit Court of Appeals also recognized and implicitly approved of the agency's

balancing of statutory mandates and constitutional rights when it denied a union's constitutional challenge to the agency's interpretation and application of § 9A. In that case, the Union argued that even the specter of agency intervention whenever a strike is "about to occur" would chill protected speech. *Id.* The federal court dismissed the Union's First Amendment claim and explained that "given the Commission's policy not to issue an order against the Union until its membership *votes* to strike, we see little likelihood that the mere discussion of striking by the membership will provoke Commission action. Past events show that Union members have not, in fact, been deterred from considering, discussing, or even voting upon a strike." *Id.* (emphasis in original). The First Circuit's approval of the LRC's well-established policy balancing the state's interest in enforcing the ban on strikes with employees' constitutional rights supports the CERB's request for GVR premised on judicial deference to an agency's longstanding interpretation of a statute it is charged with administering.

It was not until this case, when the former LRC erroneously reversed this long-standing agency precedent, that a constitutional issue arose where there had been none. Specifically, the decision erroneously found a violation of § 9A(a) even though the factual record plainly indicated that the union membership had yet to convene a meeting to discuss and vote on whether or not they should authorize an unlawful strike. By taking action to prevent the union meeting from occurring, the former LRC explicitly reversed longstanding agency precedent interpreting and applying § 9A: "To the extent our decision here conflicts with prior Commission

decisions that require an affirmative strike vote as a prerequisite to a finding that a strike violative of Section 9A either was occurring or was about to occur, *the prior decisions are overruled*." Petitioner's Appendix at 20a (emphasis added).

The former LRC's departure from well-reasoned precedent was unwarranted. The longstanding agency interpretation of § 9A - rejected by the former LRC - had avoided the constitutional confrontation raised in the Union's petition for certiorari by properly balancing § 9A(a)'s clear prohibition of strikes with employees' constitutional right to meet and discuss whether to strike. Courts have repeatedly recognized *Chevron*-like deference to the CERB's interpretation of Chapter 150E, including its interpretation of § 9A(a). *Utility Workers of America, Local 466*, 348 Mass. at 504-05, 451 N.E.2d at 127; *see also City of Boston v. Commonwealth Employment Relations Board*, 453 Mass. 389, 395, 902 N.E.2d 410, 415 (2009) (according "deference to the commission's specialized knowledge and expertise, and to its interpretation of the applicable statutory provisions" and setting aside the agency's decision only if it is arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law) (citations omitted).

An order granting GVR is warranted because the CERB explicitly rejects the former LRC's argument that the agency lacks the ability to interpret and process "about to occur" strike petitions in accordance with long-established precedent where, as in this case, the timelines for doing so are relatively short. *Cf. Lenox Education Association*, 393 Mass. at 285-86, 471 N.E.2d at 87-88 (upholding agency authority even in the face of

"the inevitability of a certain amount of delay while the commission undertook an investigation in response to a strike petition," and finding that this investigation does not compromise the right of public employers to resort to self-help when responding to illegal strike action in the public education context).

Entering a GVR order in this case is also appropriate because it would conserve scarce judicial resources. Vacating the lower court decisions and remanding the case back to the CERB would allow the CERB to reassert and apply its well-reasoned precedent that holds it would be speculative to issue an order prohibiting a strike when some further action must be taken by the union before a strike can occur. *Boston School Committee*, 27 MLC 32, 34, 2000 WL 35733304 (2000). Furthermore, an order for GVR will allow the CERB to review the evidence in light of this precedent and determine whether a violation of § 9A(a) occurred without making a ruling that would require a reviewing court to reach the constitutionality of the governing statutory scheme. *Hanover v. Housing Appeals Commission*, 363 Mass. 339, 364, 294 N.E.2d 393 (1973) (holding that the court must construe a statute, "so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." (quoting *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)).

CONCLUSION

For all these reasons, the CERB respectfully requests that the Court grant the Petitioner's request for certiorari, vacate the Massachusetts lower court decisions and remand the matter for further consideration by the CERB.

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